87-294

Supreme Court, U.S.
FILED
AUG 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court Of The United States

October Term, 1987

ALABAMA POWER COMPANY,
Appellant,

v.

BRENDA LOUISE CANTRELL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

Jurisdictional Statement

*JOHN P. SCOTT, JR.
MARTHA F. PETREY
BALCH & BINGHAM
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

BILLY L. CHURCH
CHURCH, TRUSSELL & ROBINSON
P. O. Box 504
Pell City, Alabama 35125
(205) 338-2295

Attorneys for Appellant

**Counsel of Record*

QUESTION PRESENTED

1. Whether § 12-22-72, *Code of Alabama* (1975), under which a mandatory penalty of ten percent of any money judgment is automatically imposed on an unsuccessful defendant-appellant, irrespective of the meritoriousness of the appeal, but which imposes no corresponding burden on the appeal of an unsuccessful plaintiff-appellant, whether frivolous or not, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.*

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*All parties to this case are named in the caption. Pursuant to Rule 28.1 of the Rules of this Court, the following information is provided: Appellant Alabama Power Company is affiliated with Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc., Southern Electric Generating Company, and Southern Electric International, Inc. The Southern Company is the parent company of Alabama Power Company.

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No. .....

IN THE

Supreme Court Of The United States

October Term, 1987

ALABAMA POWER COMPANY,

Appellant,

v.

BRENDA LOUISE CANTRELL,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

Jurisdictional Statement

Alabama Power Company, the appellant, appeals from the Order of the Supreme Court of Alabama dated May 22, 1987 overruling appellant's Application for Rehearing of the decision of the Supreme Court of Alabama dated September 5, 1986 and affirming the trial court's denial of its Motion for New Trial Notwithstanding the Verdict, or in the Alternative for a New Trial or Remittitur on the question of damages. Pursuant to this decision and this Order, § 12-22-72, *Code of Alabama* (1975) imposed upon appellant an automatic penalty of ten percent of the $1,000,000 judgment. Under the automatic penalty mandated by § 12-22-72, appellant's rights under the Equal Protection Clause of the Fourteenth Amendment have been violated.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama of September 5, 1986 is reproduced in App. A, *infra*, A-2-A-11, and is officially reported at 507 So.2d 1295. The Order, with opinion, of the Supreme Court of Alabama of May 22, 1987 is reproduced in App. B, *infra*, A-12-A-30, and is unreported. The order and accompanying opinion of November 10, 1986 of the Circuit Court of St. Clair County on remand from the Supreme Court of Alabama is reproduced at App. C, *infra*, A-31-A-35, and is unreported. The entry of the judgment of the trial court upon the docket sheet is reproduced at App. E, *infra*, A-37-A-38.

JURISDICTION

The May 22, 1987 Order of the Supreme Court of Alabama denying appellant's Application for Rehearing and affirming the decision of the trial court upheld § 12-22-72, *Code of Alabama* (1975) against appellant's claim under the Equal Protection Clause of the Fourteenth Amendment that § 12-22-72 is unconstitutional. The May 22, 1987 Order automatically assessed a ten percent penalty against appellant as a consequence of the decision of the Supreme Court of Alabama affirming the judgment of the trial court. The penalty was not part of any appealable judgment until that time. Thus, appellant's federal constitutional challenge to § 12-22-72 was, pursuant to an unbroken line of 16 cases decided over a 67-year period by the Supreme Court of Alabama, presented in appellant's Application for Rehearing and accompanying brief. See, App. G, *infra*, A-41-A-67.

A Notice of Appeal of the case to this Court was filed in the court below on August 10, 1987, App. F, *infra*, A-39-A-40. This Court has jurisdiction of this case under 28 U.S.C. § 1257 (2).

This appeal is being docketed in this Court within ninety days from the May 22, 1987 Order of the Supreme Court of Alabama overruling appellant's Application for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any state . . . deny to any person within its jurisdiction equal protection under the laws . . . ."

2. Section 12-22-72, *Code of Alabama* (1975) provides, in pertinent part, that:

> "When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by an execution bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against any or all of the obligors on the bond for that amount of the affirmed judgment, ten percent damages thereon and the cost of the appellate court . . ."

STATEMENT OF THE CASE

Appellant is before this Court seeking plenary consideration of its contention that a ten percent penalty automatically adjudged upon appellant for its failure to prevail on appeal under § 12-22-72, *Code of Alabama* (1975), has deprived appellant of substantial rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. This constitutional question is substantial, and is closely related to similar questions briefed and argued to, but not decided by, the Court in *Aetna Life Insurance Co. v. Lavoie*, No. 84-1601 (Apr. 22, 1986) 106 S.Ct. 1580 (1986); *Burlington Northern R. Co. v. Woods*, No. 85-1088, (Feb. 24, 1987), 107 S.Ct. 967 (1987) and pending before this Court in *Bankers Life and Casualty Company v. Crenshaw* (No. 85-1765) (prob. juris. noted Mar. 9, 1987). As the following discussion demonstrates, this issue was properly presented to the courts of Alabama.

A. Facts Relevant to the Constitutional Question Presented.

In 1969, Alabama Power Company constructed an electric

power distribution line to provide electric power to several duplex apartment buildings in Springville, Alabama. The power line was an uninsulated wire, and was installed at a height of approximately 25 feet above ground and was located between two of the apartment buildings. The line was situated 9 feet away from the nearest building. App A, *infra*, A-2.

In January, 1982, Cantrell's deceased husband and his brother, Alan Cantrell, decided to remove a television antenna from the apartment building. The men grabbed the 30 foot antenna pole and pulled it away from the strap holding it to the building. Alan Cantrell released the antenna pole and the decedent lost control of the pole, resulting in its contact with the power line and the fatal electric shock to the decedent. App. A, *infra*, A-2.

Plaintiff brought an action in the Circuit Court of St. Clair County, Alabama on February 25, 1982, alleging wrongful death and demanding $1,000,000 in damages. App. J, *infra*, A-76-A-78. Trial commenced on March 25, 1985, and following a two day trial, a jury returned a verdict of $1,000,000 for the plaintiff. App. E, *infra*, A-37-A-38. Alabama Power Company filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative for New Trial or Remittitur on April 10, 1985. App. H, *infra*, A-68-A-73. The Circuit Court of St. Clair County, Alabama denied Alabama Power Company's motion on July 1, 1985. App. D, *infra*, A-36. Alabama Power Company appealed to the Supreme Court of Alabama, raising five issues, including the argument that it was entitled to a directed verdict due to Alabama Power Company's lack of actual or constructive notice of the activity which resulted in the fatality.[1] App. A, *infra*, A-2. On September 5, 1986 the Supreme Court of Alabama affirmed the lower court's judgment and remanded for consideration that the $1,000,000 damage award was exces-

[1]Under Alabama law, actual or constructive notice of the injury causing activity is required before a duty to insulate is imposed upon Alabama Power Company. *See e.g., Alabama Power Co. v. Brooks*, 479 So.2d 1169, 1172 (Ala. 1985); *Campbell v. Alabama Power Co.*, 378 So.2d 718, 720 (Ala. 1979).

sive. App. A, *infra*, A-11. On November 10, 1986 the Circuit Court of St. Clair County considered the question of excessive damages, and overruled Alabama Power Company's Motion for Remittitur or for a New Trial on that question. App. D, *infra*, A-36. On September 19, 1986 Alabama Power Company filed an Application for Rehearing in the Supreme Court of Alabama. App. G, *infra*, A-41-A-43. On May 22, 1987 the Supreme Court of Alabama overruled Alabama Power Company's Application for Rehearing and affirmed the judgment of the Circuit Court of St. Clair County, Alabama and, without addressing the issue, imposed a ten percent affirmance penalty against Alabama Power Company. App. B, *infra*, A-12.

B. The Federal Question Was Properly Presented.

The question involving the facial unconstitutionality of § 12-22-72, *Code of Alabama* (1975), was presented for the first time in appellant's Application for Rehearing and supporting brief, App. G, *infra*, A-41-A-67. This was the proper time for appellant to present its challenge to § 12-22-72's constitutionality, since the non-discretionary imposition by the court below of the ten percent penalty on the $1,000,000 judgment was not at issue or reduced to any appealable order until that judgment was affirmed.

Appellant's challenge to § 12-22-72 was properly and timely presented in complete conformity with relevant decisions of the Supreme Court of Alabama — a line of at least 16 cases dating from 1918, in which the federal constitutionality of, or questions regarding the construction of, § 12-22-72 have been drawn into question.[2] In one such case, § 12-22-72 was chal-

[2]The Supreme Court of Alabama has routinely permitted constitutional and statutory questions regarding § 12-22-72 to be raised in an Application for Rehearing or an equivalent post-judgment motion. See *Brown Mech. Contractors, Inc. v. Centennial Ins. Co.*, 431 So.2d 932 (Ala. 1983); *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So.2d 415 (Ala. 1983); *Chapman v. Rivers Constr. Co.*, 284 Ala. 633, 227 So.2d 403 (1969); *City of Troy v. McLendon*, 279 Ala. 553, 188 So.2d 281 (1966); *Goodyear Tire & Rubber Co. v. Downey*, 266 Ala. 344, 96 So.2d 278 (1957); *Patterson v. Gains*, 264 Ala. 183, 85 So.2d 892 (1956); *Lloyd v.*

lenged under the Equal Protection Clause for the first time in an Application for Rehearing in the Supreme Court of Alabama. Without any suggestion that raising the issue at that stage was in any way improper or inconsistent with Alabama practice, the Supreme Court of Alabama, consistent with its routine practice, entertained (and rejected) the federal constitutional challenge to § 12-22-72 on the merits. *Central of Georgia Ry. Co. v. Steed,* 287 Ala. 64, 76-77, 248 So.2d 110, 120-121 (1971). In light of this long-standing practice, the action of the court below in overruling appellant's Application for Rehearing must be deemed by this Court as having implicitly upheld the constitutionality of § 12-22-72; although the majority opinion did not formally address appellant's claim regarding the constitutionality of § 12-22-72, the Order overruling appellant's Motion was presumptively not based on the lack of proper presentation of this question.[3]

As the lower court recognized in its opinion accompanying its Order denying Application for Rehearing, (when discussing another of appellant's constitutional challenges not before this Court), a constitutional challenge to § 12-22-72, *Code of Alabama* (1975) may be properly advanced for the first time upon Application for Rehearing. App. B, *infra,* A-21. Referring to an earlier Alabama case, *Central of Georgia Ry. v. Steed,* 287 Ala. 64, 76-77, 248 So.2d 110, 120-21 (1971), the lower court stated:

Stewart, 258 Ala. 627, 64 So.2d 884 (1953); *Childress v. Younger,* 258 Ala. 219, 61 So.2d 808 (1952); *City of Birmingham & Coast R. Co. v. Cary,* 250 Ala. 675, 35 So.2d 559 (1948); *Carter v. Carter,* 247 Ala. 409, 24 So.2d 759 (1945); *Snellings v. Builders' Supply Co.,* 229 Ala. 1, 155 So. 858 (1934); *Dent v. Foy,* 210 Ala. 160, 97 So. 627 (1923); *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 87 So. 205 (1920); *New York Life Ins. Co. v. Reese,* 201 Ala. 673, 79 So. 245 (1918).

[3]The only rule of appellate procedure relating to appellant's challenge to the constitutionality of § 12-22-72 is Rule 44, Ala. R. App. P., which requires that the Attorney General of Alabama be served with a copy of the written brief raising the constitutional challenge. Appellant complied with this rule. App. I, *infra,* A-74-A-75. The Rules of this Court also require that the Attorney General of Alabama be notified when 28 U.S.C. § 2403 (b) may be applicable. Appellants have complied with this rule.

> The rehearing petition in that case took issue only with the statutory ten percent affirmance penalty provision, Code 1975, § 12-22-72. Issues regarding that provision usually arise for the first time in the appellate court and do not ripen into issues until the appellate court has affirmed a judgment for plaintiff. Such issues are normally handled by motion in the appellate court after the affirmance.

App. B, *infra*, A-21. No case in the court below suggests that this challenge to § 12-22-72 was not timely presented as a matter of state law. The same is true of that section's counterpart in Mississippi, *Miss. Code Ann.*, § 11-3-23, (Supp. 1986). The Supreme Court of Mississippi has long recognized that questions regarding the implementation of § 11-3-23 are appropriately raised by way of a post-affirmative motion in that court. *Tigner v. McGehee*, 60 Miss. 242 (1882). Thus, the failure of the court below to expressly rule on this federal constitutional challenge to § 12-22-72 in overruling appellant's Application for a Rehearing in no way undermines this Court's appellate jurisdiction over this case. *See Illinois v. Gates*, 462 U.S. 213, 220 n. 2 (1983).

C. The Federal Question is Substantial.

Under § 12-22-72, *Code of Alabama* (1975), litigants who unsuccessfully appeal from money judgments are automatically penalized an additional ten percent of the original judgment. Although many States have in place statutes or rules designed to deter frivolous appeals, Alabama is one of *only three* to impose a non-discretionary mandatory penalty upon affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal.[4] The Alabama Supreme Court has recognized two

[4]In a case involving the Alabama automatic penalty statute, § 12-22-72, *Code of Alabama* (1975), this Court has observed that there are only three other such statutes. *Burlington Northern R. Co. v. Woods*, No. 85-1008 (Feb. 24, 1987) slip. op., at 2 n.1, 107 S.Ct. 967, 969 n.1 (1987). These are: Mississippi, *Miss. Code Ann.* § 11-3-23 (Supp. 1981); Kentucky, *Ky. Rev. Stat.* § 26-A-300 (1985); and Virginia, *Va. Code* § 16.1-113 (Supp. 1986).

purported policies as the basis for the statute. First, its stated purpose is to penalize frivolous, non-meritorious appeals. *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So. 205, 211 (1920) (addenda); *Chapman v. River Construction Co.,* 284 Ala. 633, 645, 227 So.2d 403, 415 (1969) (on rehearing). Another asserted purpose of the statute is to provide additional damages for effected plaintiff-appellees. *City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So.2d 174, 180 (1950). If § 12-22-72 is designed to prevent frivolous appeals, it is both indiscriminately overinclusive and unreasonably underinclusive. As to the policy of providing additional damages for effected plaintiff-appellees, § 12-22-72 is simply a penalty on a penalty and is not compensatory to plaintiff-appellees in any sense.

This Court recognized as much in *Burlington Northern R. Co. v. Woods,* 480 U.S. ....., 107 S.Ct. 967 (Feb. 24, 1987). In *Burlington Northern,* the Court held that the Alabama mandatory affirmance penalty statute has no application to judgments entered by federal courts sitting in diversity. 107 S.Ct. at 971. Petitioner had challenged the application of § 12-22-72 as violative of the equal protection and due process guarantees of the Fourteenth Amendment, and as a procedural rule inapplicable in federal courts under the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) and its progeny. This Court granted certiorari to consider the equal protection and due process challenges as well as the *Erie* claim. 457 U.S. ....., 106 S.Ct. 1456 (1986). Because this Court concluded that § 12-22-72, imposing a mandatory affirmance penalty, had no application in federal diversity actions, this Court declined to reach the Fourteenth Amendment issues. 107 S.Ct. at 968-69. However, in comparing Federal Rule 38 to § 12-22-72, this Court found that, "the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provisions of Alabama's affirmance penalty statute." *Id.* at 970. Additionally, this Court stated, "the Alabama statute *precludes any exercise of discretion* within its scope of operation." *Id.* at 971 (emphasis added).

In *Burlington Northern,* this Court cited a recent Fifth Circuit opinion, *Affholder, Inc. v. Southern Rock, Inc.,* 746 F.2d 305 (1984), which involved the rationality of the Mississippi automatic penalty statute and in which the Federal Court held that § 11-3-23 would not be implemented by that court, *id.* at 311, and found the Fifth Circuit's analysis in *Affholder* persuasive. 107 S.Ct. at 970. In *Affholder,* the Fifth Circuit pointed out that the Mississippi penalty statute,[5] unlike Rule 38, Fed. R. App. P., "penalizes those [appeals] that are merely unsuccessful" and "acts as a deterrent to exercise the rights to appeal." 647 F.2d at 309. Thus, the Fifth Circuit decision in *Affholder* not only recognizes that the affirmance penalty statute before it imposes a deterrent on the right to appeal, but it creates yet another class of litigants which is not subjected to the arbitrary imposition of the large penalty for exercising, unsuccessfully, their right to appeal.

As further support for its contention that the federal question here presented is substantial, appellant submits that § 12-22-72 is simply irreconcilable with, and must be struck down under, the reasoning in *Lindsey v. Normet,* 405 U.S. 56 (1972). In *Lindsey,* this Court recognized that "a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against a loss of rent if the tenant remains in possession [during the pendency of the appeal] . . ." 405 U.S., at 77. However, this Court unanimously struck down as "arbitrary and irrational," *id.* at 79, the Oregon statute in issue which, notwithstanding adequate statutory protections to secure the fruits of a lower court victory, *id.* at 77-78,[6] required a specific class of defendants,

[5]The Mississippi affirmance penalty statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1981), at issue in *Affholder, Inc. v. Southern Rock, Inc.,* 746 F.2d 305 (5th Cir. 1984), does not differ materially in its operation from § 12-22-72. The constitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1986) is pending before this Court in *Bankers Life and Casualty Company v. Crenshaw,* (No. 85-1765) (prob. juris. noted Mar. 9, 1987).

[6]Under Rule 38, Ala. R. App. P., both plaintiffs and defendants who take appeals in civil cases are treated in an even-handed manner as re-

tenants, to post a double bond in order to appeal from a judgment in favor of landlords. Under the Oregon statute, if the lower court judgment were affirmed on appeal, the landlord would be "automatically entitled to twice rents accruing during the appeal without proof of actual damages . . .", *id.* at 76. Nor did the double bond requirement discourage all frivolous appeals. *Id.* at 78. Under § 12-22-72, *Code of Alabama* (1975), successful plaintiff-appellants likewise receive a ten percent windfall totally unrelated to any costs they might have incurred or damages they might have suffered, and plaintiff-appellants are free to take whatever frivolous appeals they wish.

In striking down the Oregon scheme which, like § 12-22-72, provided nothing but a windfall to appellees unrelated to any costs incurred by them in defending their judgments on appeal, the Court did not question that a State could enact "reasonable procedural provisions to safeguard litigated property or to discourage patently insubstantial appeals, *if these rules are reasonably tailored to achieve these ends* and *if they are nondiscriminatorily applied.*" *Id.* at 78 (emphasis added). But, § 12-22-72 fails all of these tests; it is neither "reasonably tailored" to the stated ends nor is it applied in a uniform, nondiscriminatory fashion.

The legitimate state interest in discouraging frivolous appeals cannot be advanced in defense of § 12-22-72. Section 12-22-72 does not even allow the court below to determine whether an appeal is frivolous; this state-asserted purpose for the burden imposed by § 12-22-72 on appellants is in fact no justification at all. Even if discouraging frivolous appeals is accepted as a legitimate purpose of § 12-22-72, it is not "reasonably tailored" to advance that purpose. It is overinclusive because it also penalizes all who take unsuccessful, but substantial, appeals.

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gards the damages and costs incurred in defending a judgment that is appealed either by plaintiffs or defendants where the judgment below is affirmed and the appeal is determined to have been frivolous. This rule, in sharp contrast to § 12-22-72, adequately fulfills the legitimate state purpose of curbing abuse of the right to appeal and serves to accentuate the arbitrariness of § 12-22-72.

It is simultaneously severely underinclusive; Alabama does nothing to penalize the taking of frivolous appeals by plaintiffs who fail to secure money judgments at the trial court level or cross-appeal in an attempt to secure an even larger judgment. Thus, § 12-22-72 bears no rational relationship to the asserted purpose of discouraging frivolous appeals.

Similarly, there is no rational relationship between penalties assessed under § 12-22-72 and the asserted purpose of providing "compensation" to a prevailing appellee. First, the penalty bears no relationship whatsoever to the costs, including attorneys' fees, and which the appellee may have incurred in defending the appeal. Second, where the penalty is assessed upon a punitive damage award, and is itself unrelated to the actual damages complained of by the appellee in connection with the underlying action, it cannot be said to be compensatory for any losses suffered by the appellee based upon the underlying conduct of the appellant which resulted in the money judgment. There is no state interest in this arbitrary penalty mechanism sufficient to overcome this Court's admonition that limitations on a state-created right of appeal must be "reasonably tailored" to achieve legitimate purposes.

Even if § 12-22-72 was deemed to be "reasonably tailored" to achieve the purposes of that statute as asserted by the court below, § 12-22-72 clearly treats litigants differently. Given the importance the Court assigned in *Lindsey v. Normet* to the proposition that litigants should have equal assess to a state's appellate system, that differing treatment cannot be justified. *Lindsey* mandates that Alabama may not at any stage of litigation discriminate in favor of any class of litigants by permitting that class to take appeals wholly lacking in merit without fear of punishment while it penalizes another class with a mandatory penalty for taking a substantial appeal. When the states place a financial burden on the taking of an appeal, they must "impose this financial burden upon all . . . whose appeals have been unsuccessful." *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966). As this Court held in *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 153 (1897), litigants must "enter the courts upon

equal terms." Section 12-22-72 prevented appellant and appellee from doing so and therefore § 12-22-72 must fall.

If, as the Aetna Life Insurance Company argued to this Court in No. 84-1601, and as Bankers Life & Casualty Company argues to this Court in No. 85-1765, mandatory penalty statutes function to deny losing appellants an equal opportunity to pursue their rights of statutory appeal within the state court system and the right of appeal within the federal court system in diversity cases, then the need for this Court to address this question in this case is manifest. In fact, this Court has ruled as much in *Burlington Northern R. Co. v. Woods,* where it determined that § 12-22-72 was in direct conflict with Rule 38, Fed. R. App. P. The Court contrasted Rule 38 with an affirmance penalty statute, declaring the latter to be in conflict with Rule 38 because it had the "effect of penalizing . . . every unsuccessful appeal regardless of merit." 107 S.Ct. at 970. Unlike an award pursuant to Rule 38, which may be legitimately viewed as compensation, an award under § 12-22-72 is simply a windfall to the appellee of the kind found clearly impermissible in *Lindsey v. Normet.*

CONCLUSION

Appellant's federal constitutional claim is substantial. In direct violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution, a ten percent non-discretionary penalty has been imposed upon appellant merely for exercising its right, in a legally and factually complex case, to appeal the judgment of the trial court.

This Court has had before it the substance of this issue in a similar context in *Aetna Life Insurance Co. v. Lavoie.* In its decision in *Aetna,* this Court stated in unmistakable language that "these arguments raise important issues which, in an appropriate setting, must be resolved . . . ." Slip. op. at 14. Additionally, this Court has recognized the incompatibility of Alabama's affirmance penalty statute with Rule 38, Fed. R. Civ. P., *Burlington Northern R. Co. v. Woods,* 107 S.Ct. at 970. This

case clearly presents an "appropriate setting" in which to resolve this important issue. Further, this Court noted probable jurisdiction on March 9, 1987 in a case which presents the identical constitutional question with regard to the Mississippi affirmance penalty statute. Brief of Appellant at i, *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987). Appellant has presented its federal constitutional challenge to § 12-22-72 at the appropriate stage in this litigation. Probable jurisdiction should be noted and this case set for argument.

August 18, 1987.

Respectfully submitted,

*John P. Scott, Jr.
Martha F. Petrey
Balch & Bingham
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

Billy L. Church
Church, Trussell & Robinson
P. O. Box 504
Pell City, Alabama 35125
(205) 338-2295

Attorneys for Appellant

**Counsel for Record*

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APPENDIX A

IN THE SUPREME COURT OF ALABAMA

No. 84-1146

ALABAMA POWER COMPANY

v.

BRENDA LOUISE CANTRELL

Decided September 5, 1986

MADDOX, JUSTICE.

This is a wrongful death case. The plaintiff's husband was killed while attempting to take down a 30-foot television antenna. Decedent and his brother had pulled the antenna loose from the bracket that attached it to the house and were attempting to lower it to the ground. The brother, who was on the roof, let go of the antenna for an unknown reason while the decedent was still holding the base of it. His turning loose caused the antenna to move. The antenna contacted Alabama Power Company's 7,200-volt power line. Decedent was killed almost instantly. Plaintiff claims the line was uninsulated and that the failure of the Power Company to have the line insulated was the proximate cause of decedent's death.

The line was approximately 25 feet above the ground and about 9 feet away from the building where the antenna was attached. The jury returned a verdict in favor of plaintiff for $1 million.

Alabama Power Company (hereinafter "APCo") raises five issues on appeal. First, that the trial court erred by not granting a directed verdict or a judgment notwithstanding the verdict due to APCo's lack of notice of the condition;

second, that the trial court erred by not instructing the jury on the issue of notice; third, that the trial court erred in admitting testimony of the defendant's expert that "invaded the province of the jury"; fourth, that the trial court erred by allowing questions to be asked in front of the jury about certain reports compiled by the government relating to the danger of television antennas and power lines — APCo's motion in limine to exclude these reports was denied; and fifth, APCo claims the jury's $1 million verdict for the plaintiff was excessive.

I

First, appellant argues that it had no notice of the situation. Our rule on duty to insulate is well established and was recently restated in the case of *Alabama Power Co. v. Brooks*, 479 So. 2d 1169, 1172 (Ala. 1985), from which we quote extensively because the facts of that case are similar to those of the instant case:

> "APCo first contends that the trial court committed reversible error by not granting its motion for a directed verdict and later refusing its motion for a judgment notwithstanding the verdict. It argues that it had no duty to insulate its lines in the shop area or to take any precautionary measures with respect thereto because it had no notice, actual or constructive, of any activity on, around, or under the subject lines, which would have indicated that persons might come into contact with them. We disagree. In *Bush v. Alabama Power Co.*, 457 So. 2d 350, 353 (Ala. 1984), the Court restated the duty of a power company with regard to the use and location of uninsulated electrical lines: 'The duty of an electric company, in conveying a current of high potential, to exercise commensurate care under the circumstances, requires it to insulate its wires, and to use reasonable care to keep the same insulated wherever it may reasonably be anticipated that persons, pursuing business or pleasure, may come in contact therewith. This statement of the rule implies that, in the absence of statute or municipal ordinance, it is not necessary to insulate wires which are so placed that no one could reasonably be expected to come in proximity

> to them.' *Foster v. Alabama Power Company,* 395 So. 2d 27, 30 (Ala. 1981), citing Curtis on the Law of Electricity, § 510. In other words, Alabama Power must either insulate its electrical lines, or locate them in a position where they pose no danger to human life. However, the duty to insulate does not arise absent notice, actual or constructive, that persons may come into contact with the uninsulated wires. *Alabama Power Co. v. Alexander,* 370 So. 2d 252 (Ala. 1979)."

The *Brooks* case involved a drilling rig boom that had been raised into a 7,200-volt electric power line. In the instant case, APCo argues that it had not received notice, either actual or constructive, that persons pursuing business or pleasure might come into contact with the power line.

We cannot agree that APCo had no notice that persons might come into contact with the wire. While no allegation is made and no proof is offered that APCo knew the antenna was to be taken down on this particular day, that is not the only requirement of our rule for notice. The Power Company is under a duty to insulate its wires wherever it may reasonably be anticipated that persons, pursuing business or pleasure, may come in contact therewith. "Where the facts, upon which the existence of a duty depends, are disputed, the factual dispute is for resolution by the jury." *Alabama Power Co. v. Alexander,* 370 So. 2d 252, 254 (Ala. 1979). Furthermore, it is also the law that a motion for a directed verdict or for judgment notwithstanding the verdict will not be granted and the case will go to the jury "if the evidence or any reasonable inference arising therefrom, furnishes a mere gleam, glimmer, spark, the least particle, the smallest trace, or a scintilla in support of the theory of the complaint." *Alabama Power Co. v. Taylor,* 293 Ala. 484, 492, 306 So. 2d 236, 243 (1975). We hold that there was sufficient evidence in the instant case to provide this scintilla. The facts, upon which the existence of a duty to insulate depended, were disputed; therefore, the factual dispute was one for the jury to resolve. Some of these facts are: an aluminum antenna, set up on an apartment building and near an uninsulated power line might be reasonably foreseeable as an object which could be energized if it

touched the power line; this apartment was on the main street of Springville, Alabama, and both the power line and the antenna could be clearly viewed from the street; there are two electric meters, owned by APCo, on the side of the building a few feet from where the antenna was located, and the jury could have found that to examine the meters it would be necessary for anyone walking from the street to pass by the antenna; testimony was given that APCo meter readers had been seen in the neighborhood; and that the antenna had been in place about two years. These facts were enough to create the scintilla of evidence required by our law to create a jury question and the trial judge properly denied the motion for a directed verdict, and the JNOV.

II

Second, APCo claims that the trial court erred in failing to instruct the jury on the issue of "notice." The trial judge refused to give defendant's requested charge number 19 to the jury, which read:

> "I charge you that Alabama Power Company had no duty to insulate its wires unless you are reasonably satisfied from the evidence that the company had actual or constructive notice that the removal of an antenna was in progress in proximity to its power lines. Any notice furnished to an Alabama Power Company employee would not be notice to the Company unless it is with respect to the very matter which the agent is employed to transact for the Company and unless it comes to him while he is so engaged."

A charge almost identical to this was held not to be a proper statement of the law in the *Brooks* case. There, this Court held that such a charge was properly refused because it would require APCo to have notice of the *specific activity engaged in to establish a duty* to insulate. The activity that places APCo on notice that persons may come into contact with its lines does not have to be the same activity involved in the injury-producing accident. *Brooks,* at 1175, citing *Alabama Power Co. v. Smith,* 273 Ala. 509, 142 So. 2d 228 (1962).

In its brief, APCo argues that it has been well established in Alabama that each party is entitled to have proper instructions given by the trial court regarding *all issues* presented, and that the failure of the court to give a correct charge as to any theory of the case is reversible error, citing *Liberty National Life Ins. Co. v. Smith,* 356 So. 2d 646 (Ala. 1978); *Jones v. Blackman,* 284 Ala. 684, 228 So. 2d 1 (1969); *Health Maintenance Group of B'ham v. Rutledge,* 459 So. 2d 889 (Ala. Civ. App. 1984); *Great Northern Land & Cattle, Inc. v. Firestone,* 337 So. 2d 1323 (Ala. 1976). APCo claims that this obligation of the trial court has particular application to this case, "where the court failed and refused to charge the jury on the requirement of 'notice' to APCo," because, APCo says, "the 'notice' requirement was an essential element in [plaintiff's] case and one on which the jury received *absolutely no instruction.*" APCo claims that it alerted the trial court to this requirement in argument in support of its motion for directed verdict as well as through its requested charge no. 19, quoted above.

APCo concludes, in its brief:

> "While the trial court refused Requested Charged No. 19, it made *no* attempt to charge on 'notice' in its oral charge. In fact, the trial court, in its oral charge, simply charged on the elements of *general negligence* in an abbreviated fashion. The only charges given on the duty of an electric utility with regard to the installation and maintenance of uninsulated power lines were those given upon request. Even with these limited charges, the trial court still failed and refused to give *any* charge to the jury on the specific requirement of 'notice' *and* the requirements of 'notice' to an agent of APCo."

We do not read this Court's previous decisions as requiring notice as the only possible ground on which the duty to insulate arises. In *Alabama Power Co. v. Alexander,* 370 So. 2d 252, 254 (Ala. 1979), this Court opined:

> "In this case, there is no evidence that Alabama Power Company had either actual or constructive notice that well drilling was in progress at a site near their power lines. Absent this notice, the Power Company had no duty to insulate the wires or take other

> precautionary measures *unless* under the totality of circumstances, the Power Company should have reasonably anticipated that persons pursuing business or pleasure, might come in contact with the power lines." (Emphasis added.)

Two different standards are clearly established. Even in the absence of actual notice to APCo, if the evidence, under a totality of the circumstances, showed that APCo should have reasonably anticipated that persons, pursuing business or pleasure, might come in contact with the power lines, the duty to insulate arose. The trial judge gave an instruction on this "reasonably anticipated" standard, which correctly stated the law; therefore, the trial judge did not commit prejudicial error by failing to charge the jury on the notice issue.

III

Third, APCo argues that the trial court erred by allowing testimony which APCo urges "invaded the province of the jury." We do not agree. Expert witnesses are allowed to give their opinions "on any question of science, skill, trade or like questions" based on the facts as proved by other witnesses. Code 1975, § 12-21-160. In this case, both sides called expert witnesses. The testimony objected to is as follows:

> "Q. If you assume that a thirty foot t.v. antenna was located on the corner of the apartment on the left, and was located within approximately nine feet nine inches away from a 7,200-volt uninsulated electric line, do you have an opinion whether or not the maintenance of that line in its uninsulated condition was in keeping with good electrical practice from the standpoint of safety?
> "A. Yes, I have an opinion.
> "Q. What is that opinion?
> "MR. SCOTT: I object to his opinion based on the ground the question does not lay a proper predicate for his opinion and assumes facts not in evidence.
> "THE COURT: Overruled.
> "Q. What is your opinion?
> "MR. SCOTT: Same objection.
> "THE COURT: Overruled.

"A. In my opinion, it was not good practice to maintain the two items in that relationship to each other unless there was insulation between them.

"Q. Tell the ladies and gentlemen of the jury why it was not a safe practice to maintain an uninsulated power line within ten feet of a thirty foot antenna.

"MR. CHURCH: May it please the Court, I object to that question.

"THE COURT: Overruled.

"MR. CHURCH: Your Honor . . .

"MR. HALEY: I withdraw the question.

"Q. Explain to the ladies and gentlemen of the jury the basis for your opinion that it would be unsafe.

"MR. CHURCH: Your Honor, I object to that question. *I think it invades the province of the jury letting this witness explain to the jury what is safe and unsafe.*

"THE COURT: Overruled.

"MR. CHURCH: We except.

"A. The problem with a t.v. antenna in proximity to a power line . . . anytime that t.v. antenna can essentially fall over. If you let it fall over, it can get into the power line, and you have the potential for the antenna to become energized, reaching the same 7,200-volt potential as a power line. This can happen under any number of circumstances. Number one, t.v. antennas, especially on pieces of property such as this that is rented, are put up and taken down with some regularity as people move.

"MR. SCOTT: Judge, I object and move to exclude. That is speculation on the part of this witness. He is getting into the realm now of telling us everything about the entire community when he is an expert out of Birmingham.

"THE COURT: Overruled.

"A. In the process of putting up and taking down such an antenna, there is always the potential for the antenna contacting the power line and becoming energized and an individual being injured. Second, the problem exists from the standpoint if the antenna is blown over because of a high wind, it can contact the power line and the lead-in-wire into the house can become energized.

"MR. SCOTT: I object and move to strike that. That has nothing to do with this case. It is mere speculation. There is no evidence of wind affecting this accident whatsoever. I move to exclude it.

"THE COURT: Overruled.
"A. Because of these potential problems that exist between the wire and the antenna, they should either not be in that proximity to each other, or there should be insulation on the wire to prevent the antenna from becoming energized in the event it contacts the wire."

We agree with the statement found at § 128.05 of *McElroy's Alabama Evidence:*

> "Expert opinion that a place or appliance is safe or unsafe, or the like, is admissible if, but only if, the jury upon a presentation to them of all facts practicable to be presented, is not as capable at forming a sound opinion as is the expert."

C. Gamble, *McElroy's Alabama Evidence* § 128.05 (3d ed. 1977). Both parties in this case asked their expert witnesss questions regarding "safe" utility practices. The above questions might be properly excluded if they asked whether a specified condition was "negligent" within the legal meaning of that term. This rule is stated in *McElroy's* at § 128.07. The expert here was properly allowed to testify as to what he based his opinion on and what his expert opinion was as to the design and operation of the electrical system. This was not a matter of common knowledge, and the trial judge properly allowed the expert testimony. See generally, *Maslankowski v. Beam,* 288 Ala. 254, 259 So. 2d 804 (1972). The trial judge properly allowed the expert to state his opinion as to the maintenance and operation of an electrical system. The expert did not invade the province of the jury, because the matter was not one in the jury's knowledge or experience.

IV

Fourth, APCo argues that the trial court erred by failing to grant its motion in limine to exclude certain government reports on accidents involving television and CB radio antennas. In the first place, all of APCo's objections were sustained and the information was kept out of evidence. But appellant argues that just hearing the questions asked was prejudicial to it. Second, the *Brooks* case dealt with an issue

almost identical to this, and we held that, for the limited purpose of showing the existence of national, industry-wide evidence of a serious problem that had resulted from the fact that certain types of equipment-were coming into contact with uninsulated power lines, this type of questioning was proper. It is also relevant as to the degree of care exercised by APCo in the inspection and maintenance of its lines. *Brooks,* at 1177. Plaintiff's offer of proof at trial was for precisely this purpose:

> "MR. HALEY: For the record, I would state that we offer Plaintiff's Exhibits No. 9, 10, 11 and 12 for the purpose of establishing that it was recognized within the industry that the erection and removal of t.v. and C.B. antennas created a hazard, when done in close proximity of high power electric lines."

Under this Court's holding in *Brooks,* we might well conclude that this material would have been admissible, were we called upon to decide that issue. We do not decide the admissibility of the information offered in this case. Because all of APCo's objections were upheld, and this Court has held that similar information might be allowable for a limited purpose, APCo suffered no prejudice, and the judgment of the court is not due to be reversed on this ground.

V

Fifth, and finally, APCo claims the $1 million damage award was excessive. APCo requested that the trial court order a remittitur. Here, APCo argues as follows:

> "The imposition of punishment to APCo in the sum of $1,000,000 by the jury was clearly unwarranted under the facts and the law in this case. First, as previously emphasized, Cantrell's case was based upon a claim of simple negligence against APCo in the installation and maintenance of its power lines. Moreover, Cantrell was unable to present any evidence of 'notice' to or knowledge of APCo to raise any significant proof of culpability or informed wrongdoing. Nevertheless, this jury, following less than 2 days of testimony and without evidence of the violation of

any specific safety rule, awarded Cantrell the exact amount demanded in the complaint. This record conclusively shows that the jury's verdict had to have resulted from prejudice and passion or other improper motive to support a million dollar verdict.

"This Court has concluded that in a wrongful death action in Alabama 'the amount of the verdict and the severity of the punishment are graded according to the degree of culpability. . . .' *Airheart v. Green,* 267 Ala. 689, 693 102 So. 2d 687 (1958)."

We do not at this time decide this issue, but we remand the cause with directions to the trial court to review its judgment in accordance with guidelines set out in our recent decisions in *Hammond v. City of Gadsden,* [Ms. July 11, 1986], ____ So. 2d ____ (Ala. 1986); *Harmon v. Motors Insurance Corp.,* (Ms. July 11, 1986) ____ So. 2d ____ (Ala. 1986); and *Alabama Farm Bureau Mutual Cas. Ins. Co. v. Griffin,* (Ms. July 11, 1986) ____ So. 2d ____ (Ala. 1986).

AFFIRMED, IN PART; REMANDED, WITH DIRECTIONS.

Torbert, C. J., and Almon, Beatty, and Houston, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

No. 84-1146

ALABAMA POWER COMPANY

v.

BRENDA LOUISE CANTRELL

Decided May 22, 1987

On rehearing, IT IS ORDERED that the application for rehearing be, and the same is hereby, overruled.

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Alabama Power Company, and Aetna Casualty & Surety Company, surety on the supersedeas bond, pay the amount of the judgment of the circuit court plus ten percent damages and interest and the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

OPINION BY PER CURIAM

TORBERT, CJ., JONES, ALMON, SHORES, BEATTY AND HOUSTON, JJ., CONCUR; MADDOX, J., CONCURS IN PART AND DISSENTS IN PART; ADAMS AND STEAGALL, JJ., NOT SITTING.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 9th day of June 1987.

/s/ Robert G. Esdale

Clerk,
Supreme Court of Alabama

IN THE SUPREME COURT OF ALABAMA

No. 84-1146

ALABAMA POWER COMPANY

v.

BRENDA LOUISE CANTRELL

Filed May 22, 1987

ON APPLICATION FOR REHEARING
AND ON RETURN AFTER REMAND

PER CURIAM.

On original deliverance, this Court affirmed the judgment of the trial court in part, but remanded the cause to the trial court with directions for that court to review its judgment in accordance with guidelines set out in our decisions in *Hammond v. City of Gadsden,* 493 So. 2d 1394 (Ala. 1986), and *Alabama Farm Bureau Mutual Cas. Ins. Co. v. Griffin,* 493 So. 2d 1379 (Ala. 1986), and to determine whether, in its opinion, the judgment in the amount of $1 million should be reduced.

APCo timely filed an application for rehearing, in which it claimed (1) that this Court misconstrued the facts of the case; (2) that this Court established a new legal standard in cases in which liability is sought to be imposed on APCo because an object, such as the TV antenna in this case, contacts one of its uninsulated lines; (3) that no liability should exist on APCo when the proof shows that it had complied with industry standards applicable to the duty an electrical company owes to those who might reasonably be expected to come into contact with one of its uninsulated wires; (4) that the opinion, as written, makes APCo an

insurer and imposes strict liability in electrical contact cases; (5) that the 10% affirmance penalty under Code 1975, § 12-22-72 violates the Fourteenth Amendment to the Constitution of the United States; and (6) that the punitive damages verdict of $1 million violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

I

We first consider APCo's argument that the undisputed facts show that it had no actual or constructive notice that persons might be expected to come into contact with its uninsulated line.

We have carefully reviewed the facts of the case, and the law as set out in the original opinion, and we are of the opinion that the evidence in this case was sufficient for the jury to find, based on a totality of the circumstances, that APCo knew or should have known that persons, pursuing business or pleasure, might come in contact with the power line.

In his order on remand, the trial judge has set out some of the evidence upon which the jury could have relied in finding liability in this case. We set out the full text of that order later in this opinion.

Because we are of the opinion that the original opinion adequately sets forth the facts of the case and correctly states the law applicable to those facts, we are of the opinion that the application for rehearing on the question of liability is due to be overrruled.

II

On original deliverance, we did not decide whether the punitive damages award of $1 million was excessive, but we remanded the cause "with directions to the trial court to review its judgment in accordance with guidelines set out in our recent decisions in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Harmon v. Motors Insurance Corp.*, 493

So. 2d 1370 (Ala. 1986); and *Alabama Farm Bureau Mutual Cas. Ins. Cas. Co. v. Griffin*, 493 So. 2d 1379 (Ala. 1986)."

On remand, the trial court conducted a hearing and entered the following order:

ORDER

"[This] action was remanded with direction by the Supreme Court in the opinion filed September 8, 1986 for review by the Trial Court in accordance with guidelines set out in recent decisions.

". . . [T]he Trial Court submits the following review in accordance with said remand with directions:

"This case was tried before the undersigned Judge with a jury. At the close of all the testimony, the Defendant made a Motion for a Directed Verdict contending that Plaintiff had not proved any negligence on the part of the Defendant. The Court heard extensive arguments on the Motion and was of the opinion that it was due to be overruled and entered an Order overruling said motion. The case was submitted to the Jury, and the Jury found in favor of the Plaintiff and against the Defendant, and assessed Plaintiff's damages at $1,000,000.00.

"The defendant filed a Motion for a New Trial, again contending that there was no evidence to support a submission of the case to the Jury, and also contending that the amount of damages awarded was excessive. This Motion was set down for an oral hearing and was fully argued by both sides. This Court overruled the Motion for a New Trial, and also overruled the Motion for a Remittitur of Damages.

"The Defendant appealed the action to the Supreme Court and the opinion of the Supreme Court was filed on September 5, 1986. The Court affirmed the case as to liability and remanded to this Court for a review of its judgment with directions with reference to damages.

"Subsequent to September 5, 1986, the Defendant filed a Petition for Rehearing in the Supreme Court, which, according to the Court's understanding, is now pending.

"After the case was remanded to this Court, the Defendant filed a Petition for New Trial or Remittitur on Remand. In that petition, the Defendant has asserted a constitutional issue, which was not raised on the trial of the case and was not raised at any time while

the case was pending in this Court. The Plaintiff filed a Motion to Strike the Petition insofar as it asks for a new trial on the question of liability. Since the issue of liability has been decided by the Supreme Court and that matter is now pending on a Petition for Rehearing, this Court is of the opinion that it does not have jurisdiction on that issue and has granted the Plaintiff's Motion to Strike that part of the Petition.

"The Court now will review the issue of damages in accordance with the mandate of the Supreme Court.

"The only damages that could be awarded in this case are what are designated as punitive damages. Punitive damages are awarded for two purposes, namely: (1) to punish a Defendant for a wrong done and (2) to deter this Defendant and others similarly situated, from committing like or similar wrongs in the future, and thus preserving human life. This Court further recognizes that the amount of damages in a death case are to be in accordance with the enormity of the wrong and the jury should take into consideration the necessity of preventing similar wrongs in the future.

"This Court finds that the jury which decided this case was not irresponsible, biased or prejudiced. The Court finds that the Jury's verdict was not based on anything other than a conscientious desire on the part of the Jury to render a just verdict in keeping with the Court's charge as to matters that they should consider in awarding damages. The Defendant does not contend that there was any improper conduct on the part of the Plaintiff's attorneys. The Court did fully charge the jury on the question of damages in accordance with the decisions of the Supreme Court. The Court, therefore, finds that the case was tried before a fair and impartial jury. The Court further finds that there was no indication, either during or after the trial, to even suggest that the jury acted improperly or that the verdict was based on prejudice, sympathy or favoritism. To the contrary, the court finds that the twelve people who decided this case were good and reliable citizens, who discharged their duty in a conscientious manner.

"The Court will now review some of the testimony which the Jury heard and which it no doubt considered in arriving at its verdict.

"The T.V. antenna had been in close proximity to an uninsulated power line transmitting 7,200 volts of electricity for at least two years. There was sufficient

evidence for the Jury to have found that the Defendant had actual knowledge of the existence of this condition, and if they did not have actual knowledge, they certainly had constructive notice. A person driving down Main Street in Springville, Alabama, could have seen the condition from the street. There was evidence that the Defendant had an ongoing inspection program in effect during the two-year period while this condition existed, and any type of an inspection would have disclosed this dangerous condition. There further was evidence from a supervisory employee of the Defendant and from a disinterested witness that meter readers regularly read the meter, which was in very close proximity to the antenna. The dangerous instrumentality, and that T.V. antennas in close proximity to high power transmission lines create a real danger. [sic] There was also testimony that a person standing at ground level could not tell whether the power line was insulated or not. The Defendant knew that this power line was not insulated.

"The Alabama Power Company is presumed to know the law that says certain power lines must be insulated. An official of the Alabama Power Company admitted that if this line had been insulated, the accident probably would not have occurred.

"There was evidence from which the Jury could have found that even though the Defendant knew of this dangerous condition, it would not have insulated the wire so long as it met the minimum clearance requirements of the Electrical Code. The Jury could have also found that the minimum clearance requirements of the Code were insufficient to render the situation that existed at the time of the accident reasonably safe. The Defendant now argues that it had no notice that this dangerous condition existed at the place of the accident. This contention was not made in the course of the trial. The only contention concerning notice that was made in the trial of the case was that they had no notice of the fact that the antenna was going to be taken down.

"This Court does not decide the question as to whether or not the jury did, in fact, believe all of the contentions above set forth, but they certainly could have believed it. If they did believe what they heard, they could have found that the Defendant had actual notice of the existence of the T.V. antenna; that the location of said antenna was in close proximity to a

7,200 volt power [line]; that the location of the T.V. antenna and power line created an extremely dangerous condition; that the Defendant knew that it was likely that the T.V. antenna would come in contact with the power line and the power line was likely to cause the death of innocent persons. The Jury could have further found from the evidence that the Power Company would not insulate its power line even though it knew it created a life-threatening condition so long as it met the minimum clearance standards of the National Electrical Safety Code.

"I am of the opinion that a $1,000,000.00 verdict is not excessive in view of the facts of this case.

"This was my reason for originally overruling the Defendant's Motion for a Remittitur. After having considered the matter again, I am still of the opinion that $1,000,000.00 is not excessive. The condition that existed at the time of this accident should not be allowed to exist. A small verdict would not, in my opinion, cause this Defendant to change its practices with reference to taking appropriate steps to correct such conditions. Hopefully, a verdict of $1,000,000.00 will cause this Defendant and other power companies to comply with the law and thus save lives.

"It is therefore ORDERED, ADJUDGED AND DECREED that the Motion for Remittitur or for a New Trial on the question of damages is overruled.

"This the 6th day of November, 1986.

"/s/ Carl D. NeSmith
"Circuit Judge
"30th Judicial Circuit"

The parties have filed briefs in support of their respective positions regarding the order of the trial judge, and we now proceed to consider their arguments and address the legal issues involved.

III

On the damages issue, APCo argues that it is entitled to a new trial, or at least a remittitur, based on two grounds: (1) The trial court's statement of facts and conclusions in the order entered on remand are not supported by the record; (2) The punitive damages award of $1 million

violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment.[1]

Counsel for APCo, in its brief on the damages issue, once again asserts that this Court and the trial court have misconstrued the evidence in this case. The trial judge, in his order on remand, in addressing the central argument made by APCo that it had no notice, actual or constructive, that someone would be injured or killed if it did not insulate its line, not only found that there was sufficient evidence to support such a finding, but further noted:

> "The Defendant now argues it had no notice that this dangerous condition existed at the place of the accident. This contention was not made in the course of the trial. The only contention concerning notice that was made in the trial of the case was that they had no notice of the fact that the antenna was going to be taken down."

APCo's argument on ground (2) of the damages issue, that the punitive damages award violates federal constitutional guarantees, is succinctly stated in the concluding paragraphs of its brief:

> "[T]his Court has several viable alternatives to remedy the severe and excessive $1 million punishment imposed upon APCo for its alleged simple negligence. This Court should be compelled to examine the lack of realistic standards in Alabama to guide a jury in assessing punitive damages for wrongful death and the disparity in punishment for civil defendants versus criminal defendants in cases of negligent homicide. This disparity warrants a finding that Alabama's wrongful death statute, in its exclusive punitive damage[s] remedy, is archaic, unjust, and unconstitutional.
>
> "Alternatively, this Court must be compelled, at the very least, to order a new trial or a remittitur based

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[1] APCo does not claim that the punitive damages award also violates the "excessive fines" provision of our own Alabama Constitution. See, Art. I, § 15, Constitution of Alabama, 1901, which has been in every Constitution since 1819, when Alabama became a state.

upon the absence of evidence of such culpability and wrongdoing [as would] support the $1 million punishment imposed by this jury. As the overseer Court, it must remedy the injustice imposed on a defendant by a jury that had to have been motivated improperly to conclude that a $1 million punishment was appropriate under the true facts in this case. Accordingly, this Court must reverse the trial court's decision and order a new trial or a substantial remittitur so [as] to have the jury's verdict truly reflect the evidence actually proven in this action."

Cantrell, on the other hand, argues that we should not entertain the federal constitutional claims because they were not raised in the trial court either before or during the trial of the case; were not raised in the trial court when APCo filed, argued, and briefed its motion for a new trial or for a remittitur; and were not argued, or briefed, to this Court on original submission; but, on the other hand, were raised for the first time in APCo's brief in support of its application for rehearing before this Court. Cantrell argues that an identical factual setting was before this Court in *Merrell v. Alabama Power Co.,* 382 So. 2d 494, 497 (Ala. 1980), and that this Court disposed of the application for rehearing there by writing:

"In brief in support of her application for rehearing the appellant says:

" 'Merrell now for the first time contends in her application for rehearing that the Alabama wrongful death statute is unconstitutional for being in violation of the guarantee to the citizens of each state of the United States in the 14th Amendment to the constitution of the United States of America which provides in substance that no state shall deprive any person of property without due process of law nor deny any person within its jurisdiction the equal protection of the laws.'

"The appellant candidly admits that she did not attack the constitutionality of the wrongful death statute in the trial court nor in this Court on original submission, and acknowledges that as a general rule, this Court will not decide the constitutionality of a state statute when the issue is raised for the first time in the appellate court. *Riley v. Smyer,* 265 Ala. 475, 91 So. 2d

820 (1957). She simply asks us to make an exception to that rule in this case. We decline to do so. The rule is an ancient one, founded on sound reasoning. *Cooper v. Green,* 359 So. 2d 377 (Ala. 1978)."

APCo counters that it is aware of the principle that "where a constitutional question was not raised on trial it will not be considered on appeal," *City of Montgomery v. Robinson,* 441 So. 2d 857, 861 (Ala. 1983), but contends that this Court has considered federal constitutional claims advanced for the first time on application for rehearing, and cites *Central of Georgia Ry. v. Steed,* 287 Ala. 64, 76-77, 248 So. 2d 110, 120-21 (1971).

The rehearing petition in that case took issue only with the statutory ten per cent affirmance penalty provision, Code 1975, § 12-22-72. Issues regarding that provision usually arise for the first time in the appellate court and do not ripen into issues until the appellate court has affirmed a judgment for plaintiff. Such issues are normally handled by motion in the appellate court after the affirmance. Thus, a rehearing, such as that in *Steed,* challenging the constitutionality of § 12-22-72 or its predecessor code sections, does not provide a precedent for a rehearing challenging the constitutionality of the statute authorizing the cause of action on which the suit is based.

APCo has cited no authority allowing a party to raise, for the first time, on rehearing in an appellate court the constitutionality of the statute under which the action was tried. Such a procedure is contrary to sound practice. See, for example, the many cases cited at 2 Ala. Dig., Appeal and Error, Key No. 170(2).

IV

We have carefully reviewed the findings and conclusions of the trial judge, and have reviewed the award made in this case, using essentially the same criteria we directed the trial judge to use, and we are of the opinion that the judgment of the trial court is due to be affirmed on the damages issue. Cf. *General Motors Corp. v. Edwards,* 482 So. 2d 1176 (Ala. 1985), a case involving two wrongful death claims and in

which the jury awarded verdicts of $2,000,000 in each of the claims, and in which this Court upheld the trial court's remittitur which reduced the award on each claim to $1,400,000. There, this Court said:

> "This Court has long recognized that appellate review of remittitur 'involves a review of [the] trial court's judgment based upon [its] observation of all the witnesses who testified in the case and other incidents of the trial which cannot be reflected in the transcript and which are not available for observation by us.' *Airheart v. Green,* 267 Ala. 689, 693, 104 So. 2d 687, 690 (1958).
>
> "In *Airheart,* this Court did conclude that in a case *involving our homicide statute, as this case does, 'the amount of the verdict and the severity of the punishment are graded according to the degree of culpability. . . .'* 267 Ala. at 693, 104 So. 2d at 691." (Emphasis added.)

APCo argues that its conduct was not so culpable as to justify an award of $1 million against it. Certainly, the culpability of APCo is as great as that of General Motors in the *Edwards* case.

Based on the foregoing, we are of the opinion that the application for rehearing is due to be overruled.

OPINION EXTENDED; APPLICATION OVERRULED; AFFIRMED.

Torbert, C. J., and Jones, Almon, Shores, Beatty, and Houston, JJ., concur.

Maddox, J., concurs in part and dissents in part.

Adams and Steagall, JJ., not sitting.

IN THE SUPREME COURT OF ALABAMA

No. 84-1146

ALABAMA POWER COMPANY

v.

BRENDA LOUISE CANTRELL

Decided May 22, 1987

Maddox, Justice, Concurring in Part; Dissenting in Part

I concur in the affirmance of the judgment of the trial court, but I cannot agree that this Court should not address the constitutional claims because they were not timely presented. By refusing to remit the amount of the judgment upon penalty of a reversal of the case, as authorized by Code 1975, § 12-22-71,[1] when requested to do so by APCo, the Court has ruled on the question of the excessiveness of the verdict *independently;* consequently, this case is more like *Central of Georgia Ry. v. Steed,* 287 Ala. 64, 76-77, 248 So. 2d 110, 120-21 (1971), and not like *Merrell v. Alabama Power Co.,* 382 So. 2d 494, 497 (Ala. 1980), where the constitutionality of the wrongful death statute itself was involved. Here,

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[1]Section 12-22-71 reads as follows: "When an appeal is taken to the appropriate appellate court from the judgment of any court and the appellate court shall be of the opinion that the case should be reversed because the judgment of the lower court is excessive and that there is no other ground of reversal, the appellate court shall notify the appellee of the amount which it deems in excess of the just and proper amount of recovery and require the appellee, within a time to be stated in said notice, to remit such amount upon penalty of a reversal of the case. If the appellee does not, within the time stated in such notice or within such further time as may be granted by the court for good reason file a remittitur of such excessive amount, the appellate court shall reverse and

the company claims that *this Court's refusal* to remit the amount of the judgment as a condition of affirmance is a deprivation of its federal constitutional rights.

I will set out in this separate opinion why I believe the federal constitutional claims were timely presented, and why I believe the Court correctly refuses to hold that the judgment in this case is excessive.

I

Although this Court did not formally address the claims in its original opinion, the same federal constitutional claims raised on rehearing in this case were raised on application for rehearing in *Aetna Life Ins. Co. v. Lavoie,* 470 So. 2d 1060 (Ala. 1984), and this Court overruled the application. Aetna petitioned the Supreme Court of the United States to review the federal constitutional claims that had been raised in its application for rehearing, and, also, in a subsequent motion asked that this Court disqualify itself because of the alleged disqualification of one member of the Court who participated in the decision in that case. The Supreme Court of the United States took jurisdiction of Aetna's petition, and, although that Court reversed the judgment of this Court on the ground that one of this Court's Justices was disqualified, as a matter of law, the Court did discuss the other constitutional claims made by Aetna, as follows:

> "Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, Section 10; that a $3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of

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remand the case; but, if the appellee shall file with the court a remittitur of the amount deemed excessive by the court, the appellate court shall reduce the amount of the judgment accordingly and shall affirm the case and enter a judgment for such reduced amount, which judgment so entered shall be and remain the judgment of the lower court and shall date back to the time of the entry or rendition of the judgment in the lower court. (Acts 1915, No. 542, p. 610; Code 1923, § 6150; Code 1940, T. 7, § 811.)"

> sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment. In addition, appellant contends that Ala. Code § 12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed a 10% penalty, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. These arguments raise important issues which, *in an appropriate setting,* must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them." (Emphasis added.)

Aetna Life Ins. Co. v. Lavoie, ___ U.S. ___, 106 S. Ct. 1580, 1589, 89 L.Ed.2d 823 (1986).

Of course, I cannot tell what the Supreme Court of the United States meant when it used the term "in an appropriate setting," but I must conclude that the Supreme Court of the United States, if it desired, would hold that APCo's federal constitutional claims have been adequately presented to this Court, for purposes of federal review of those claims.

By reviewing these federal constitutional claims presented for the first time on application for rehearing, I essentially would follow the same procedure this Court followed in the *Aetna* case, and in *Central of Georgia Ry. v. Steed, supra.* I do not believe *Merrell v. Alabama Power Co.* is apt authority for refusing to consider the constitutional claims.

II

Because I would review the constitutional claims, the first question I necessarily would address is whether the Excessive Fines Clause of the Eighth Amendment should be held to apply to punitive damages awards in civil cases. The Supreme Court of the United States, in the *Aetna v. Lovoie* case, as I have already shown, did not answer the question; consequently, it is one of first impression in this state.

The parties are in sharp disagreement on the question, and I am without benefit of much precedent. My research has uncovered only one case in which the question has been decided. In *Palmer v. A. H. Robins Co.,* 684 P. 2d 187, 217

(Colo. 1984), plaintiff filed a products liability claim to recover compensatory and punitive damages from the manufacturer of an intrauterine device. The trial court entered a judgment for $600,000 in compensatory damages and $6,200,000 in punitive damages. There, a divided court, addressing the manufacturer's constitutional claim, wrote:

> "*Cruel and Unusual Punishment.* Robins argues that the punitive damages statute violates the constitutional proscription against cruel and unusual punishments and excessive fines. *U.S. Const.* amends. VIII and XIV. This argument centers on the proposition that the punitive damages statute fails to establish an appropriate mechanism for limiting punitive damages awards against Robins in other cases. What the argument overlooks, however, is the more fundamental proposition that the Cruel and Unusual Punishments Clause deals exclusively with the criminal process and criminal punishments. As the United States Supreme Court observed in *Ingraham v. Wright,* 430 U.S. 651, 667, 97 S.Ct. 1401, 1410, 51 L.Ed.2d 711 (1977), the Clause circumscribes the criminal process in three ways:
>
> " 'First, it limits the kinds of punishment that can be imposed on those convicted of crimes, *e.g., Estelle v. Gamble,* [429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)]; *Trop v. Dulles,* [365 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)]; second, it proscribes punishment grossly disproportionate to the severity of the crime, *e.g., Weems v. United-States,* [217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910)]; and third, it imposes substantive limits on what can be made criminal and punished as such, *e.g., Robinson v. California,* [370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)] . . . . "The primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes. . . ." *Powell v. Texas* [392 U.S. 514], 531-32 [88 S.Ct. 2145, 2153-54, 20 L.Ed.2d 1254 (1968)] (plurality opinion).'
>
> The Clause, therefore, has no application to a civil proceeding involving a punitive damages claim ancillary to a civil cause of action. *See Unified School District No. 490 v. Celotex Corp.,* 6 Kan.App.2d 346, 355-56, 629 P. 2d 196, 206 (1981)."

Although the Colorado court was of the opinion that *Ingraham v. Wright,* 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), supported its holding that the Excessive Fines Clause of the Eighth Amendment did not apply to a civil proceeding, I must assume that the Supreme Court of the United States will, "in an appropriate setting," address the question of whether the Excessive Fines Clause of the Eighth Amendment would apply to a civil case in which punitive damages have been awarded. *Aetna Life Ins. Co. v. Lavoie,* ___ U.S. at ___, 106 S.Ct. at 1589 (1986). But, see, *Ex parte Watkins,* 32 U.S. (7 Pet.) 568, 574 (1833), where the Supreme Court held that "[t]he eighth amendment is addressed to courts of the United States exercising criminal jurisdiction." A literal reading of the *Watkins* holding would be that the Bill of Rights applies only to courts exercising "criminal jurisdiction," and I am unsure at this time whether the Supreme Court of the United States will hold that the Eighth Amendment guarantee is applicable to punitive damages awards in civil cases. The language the Court used in *Aetna v. Lavoie,* which I have quoted above, indicates the Court will consider the Excessive Fines question "in an appropriate setting"; I believe this case is in that posture and, consequently, I would consider the question.

APCo contends that the relevant history of the Excessive Fines Clause of the Eighth Amendment and its English antecedents would require the application of that clause to punitive damages awards in civil cases. My review of the history of the Excessive Fines Clause of the Eighth Amendment and its English antecedents convinces me that the clause may be broad enough to cover punitive damages awards in *civil cases.*

The Supreme Court of the United States has recently reexamined the history of the Eighth Amendment and has examined English antecedents to questions arising under the amendment, *Solem v. Helm,* 463 U.S. 277, 284-86 (1983); *Ingraham v. Wright,* 430 U.S. at 664-66, and there is some support for APCo's position that "the historical antecedents to the Excessive Fines Clause support the contention that it should be applied to civil punitive damages awards." APCo

contends that the Excessive Fines Clause can be traced to the "excessive amercement" provision of the Magna Charta, and that "amercements" were additional punishment for defendants in civil cases in 13th-Century England. In its brief, APCo argues:

> "One response to the problems of punitive damages law has been substantive. That is, some jurisdictions have disallowed punitive damages in particular types of cases and for particular types of defendants. For example, several states have eliminated the remedy in wrongful death cases, and the United States Court of Appeals for the Ninth Circuit has explained that the basis for that exception lies in the dangers of 'excessive liability' and 'the temptation for a jury to award punitive damages even when concrete elements of ... intentional wrongdoing are absent. [Citing in a footnote: *In re Paris Air Crash,* 622 F. 2d 1315 (9th Cir.) (applying California law), cert. denied, 449 U.S. 976 (1980).] Ironically, the very same legislatures do permit punitive damages in survival actions, where the plaintiff is allowed to present graphic evidence of the decedent's pain and suffering."

In a footnote, APCo points out, as I have already suggested, that the Supreme Court of the United States in *Aetna v. Lavoie, supra* has indicated that it would probably take jurisdiction of a case "in an appropriate setting" to resolve this constitutional issue. For the purpose of deciding this case, I *assume* that the Excessive Fines Clause *does apply*, but even assuming that the Excessive Fines Clause of the Eighth Amendment applies to this punitive damages award, I am of the opinion that the award made in this case does not constitute an "excessive fine."

III

I am aware of the public policy issues which are presented in civil cases in which juries award substantial damages, and this Court, using various procedures available to it, has attempted to insure that justice is meted out to parties to civil litigation; however, in many cases we are dealing with provisions of substantive law, and changes in that law are

appropriately made by the legislative branch of government. See, Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 Va.L.Rev. 269 (1983).

We remanded this case for the trial court to consider once again the argument that the punitive damages award was excessive, under the principles of *Hammond, supra.* In *Hammond,* we set out several factors to be considered, including the culpability of the defendant's conduct and the desirability of discouraging others from similar conduct, but we stated that the factors set out were by "no means exclusive." *Hammond* involved a claim of fraud. This is a wrongful death case, and I am of the opinion that because it is a wrongful death action, this is another factor that can, and should, be considered when assessing the claim that a punitive damages award is excessive.

IV

APCo additionally argues that the punitive damages award violates rights guaranteed to it under the Equal Protection Clause of the Fourteenth Amendment. It states, in its brief:

> "The disparity in punishment and penalties imposed for negligent homicide in Alabama in civil versus criminal cases also violates equal protection rights afforded under the Fourteenth Amendment to the U.S. Constitution. This distinction should be subject to 'strict scrutiny,' when, as here, it enables the state to circumvent the guaranties of the Fourth and Sixth Amendments by imposing punishment through civil prosecution. The deprivation of these fundamental rights requires that Alabama's wrongful death statute be narrowly drawn to satisfy any alleged compelling state interest. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 68 (1981); *Dunn v. Blumstein,* 405 U.S. 330, 338-39 (1972).
>
> "Even if this infringement were not sufficient to justify strict scrutiny, this distinction has no rational basis. The Equal Protection Clause, at a minimum, requires this much. *Arlington County Bd. v. Richards,* 434 U.S. 5 (1977); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 8 (1974). While there may be a basis for imposing

> greater punishment upon criminal defendants due to the State objective to promote respect for the criminal laws and due to the application of increased standards of proof and procedural safeguards, there is certainly no rational basis for imposing more severe punishment on civil defendants. Accordingly, this counterintuitive distinction is unconstitutional, for it is imposed without any 'rational basis.'
>
> "In summary, numerous courts have declared their disfavor of punitive awards substantially greater than corresponding criminal monetary penalties. *Jameson v. Zuehlke,* 218 S.W. 2d 907, 911-912 (Tex. Civ. App. 1938); *Jasterbowski v. Michos,* 337 N.E. 2d 617, 631-32 (Ohio App. 1975); *Roginsky v. Richardson-Merrell Inc.,* 378 F.2d 832, 839-41 (2nd Cir. 1967). Alabama's statutory scheme, in its allowance of such severe disparity in punishment for wrongful death resulting from negligence, should also be seriously questioned and upon close consideration by this Court, declared unconstitutional in its denial of equal protection rights."

I cannot agree with APCo that Alabama's Wrongful Death Statute is unconstitutional because it authorizes the recovery of punitive damages in excess of a fine which might be levied against it in a criminal proceeding.

V

Whether the federal constitutional claims were timely raised is a question which the Supreme Court of the United States will have to decide if it grants a review of this Court's judgment. See *Aetna v. Lovoie,* ___ U.S. at ___ 106 S.Ct., at 1589, 899 L.Ed.2d 823 (1986). Cf. *Orr v. Orr,* 440 U.S. 279, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

VI

Based on the foregoing, I agree that the majority correctly refused to order a remittitur, but I respectfully dissent from that portion of the opinion which holds that the federal constitutional claims were not timely presented to this Court.

APPENDIX C

IN THE CIRCUIT COURT FOR
ST. CLAIR COUNTY, ALABAMA

Civil Action No. CV-84-000027
Supreme Court of Alabama No. 84-1146

BRENDA LOUISE CANTRELL, etc.

v.

ALABAMA POWER COMPANY, et al.

Decided November 6, 1985

ORDER

The above styled action was remanded with direction by the Supreme Court in the opinion filed September 8, 1986 for review by the Trial Court in accordance with guidelines set out in recent decisions.

In accordance with said remand, the Trial Court submits the following review in accordance with said remand with directions:

This case was tried before the undersigned Judge with a jury. At the close of all the testimony, the Defendant made a Motion for a Directed Verdict contending that Plaintiff had not proved any negligence on the part of the Defendant. The Court heard extensive arguments on the Motion and was of the opinion that it was due to be overruled and entered an Order overruling said motion. The case was submitted to the Jury, and the Jury found in favor of the Plaintiff and against the Defendant, and assessed Plaintiff's damages at $1,000,000.00.

The Defendant filed a Motion for a New Trial, again contending that there was no evidence to support a submis-

sion of the case to the Jury, and also contending that the amount of damages awarded was excessive. This Motion was set down for an oral hearing and was fully argued by both sides. This Court overruled the Motion for a New Trial, and also overruled the Motion for a Remittitur of Damages.

The Defendant appealed the action to the Supreme Court and the opinion of the Supreme Court was filed on September 8, 1986. The Court affirmed the case as to liability and remanded to this Court for a review of its judgment with directions with reference to damages.

Subsequent to September 8, 1986, the Defendant filed a Petition for Rehearing in the Supreme Court, which, according to the Court's understanding, is now pending.

After the case was remanded to this Court, the Defendant filed a Petition for New Trial or Remittitur on Remand. In that petition, the Defendant has asserted a constitutional issue, which was not raised on the trial of the case and was not raised at any time while the case was pending in this Court. The Plaintiff filed a Motion to Strike the Petition insofar as it asks for a new trial on the question of liability. Since the issue of liability has been decided by the Supreme Court and that matter is now pending on a Petition for Rehearing, this Court is of the opinion that it does not have jurisdiction on that issue and has granted the Plaintiff's Motion to Strike that part of the Petition.

The Court now will review the issues of damages in accordance with the mandate of the Supreme Court.

The only damages that could be awarded in this case are what are designated as punitive damages. Punitive damages are awarded for two purposes, namely: (1) to punish a Defendant for a wrong done and (2) to deter this Defendant and others similarly situated, from permitting like or similar wrongs in the future, and thus preserving human life. This Court further recognizes that the amount of damages in a death case are to be in accordance with the enormity of the wrong and the jury should take into consideration the necessity of preventing similar wrongs in the future.

This Court finds that the jury which decided this case was

not irresponsible, biased or prejudiced. The Court finds that the Jury's verdict was not based on anything other than a conscientious desire on the part of the Jury to render a just verdict in keeping with the Court's charge as to matters that they should consider in awarding damages. The Defendant does not contend that there was any improper conduct on the part of the Plaintiff's attorneys. The Court did fully charge the jury on the question of damages in accordance with the decisions of the Supreme Court. The Court, therefore, finds that the case was tried before a fair and impartial jury. The Court further finds that there was no indication, either during or after the trial, to even suggest that the jury acted improperly or that the verdict was based on prejudice, sympathy or favoritism. To the contrary, the Court finds that the twelve people who decided this case were good and reliable citizens, who discharged their duty in a conscientious manner.

The Court will now review some of the testimony which the Jury heard and which it no doubt considered in arriving at its verdict.

The T.V. antenna had been in close proximity to an uninsulated power line transmitting 7,200 volts of electricity for at least two years. There was sufficient evidence for the Jury to have found that the Defendant had actual knowledge of the existence of this condition, and if they did not have actual knowledge, they certainly had constructive notice. A person driving down Main Street in Springville, Alabama, could have seen the condition from the street. There was evidence that the Defendant had an ongoing inspection program in effect during the two year period while this condition existed, and any type of an inspection would have disclosed this dangerous condition. There further was evidence from a supervisory employee of the Defendant and from a disinterested witness that meter readers regularly read the meter, which was in very close proximity to the antenna. The dangerous instrumentality, and that T.V. antennas in close proximity to high power transmission lines create a real danger. There was also testimony that a person standing at ground level could not

tell whether the power line was insulated or not. The Defendant knew that this power line was not insulated.

The Alabama Power Company is presumed to know the law that says certain power lines must be insulated. An official of the Alabama Power Company admitted that if this line had been insulated, the accident probably would not have occurred.

There was evidence from which the Jury could have found that even though the Defendant knew of this dangerous condition, it would not have insulated the wire so long as it met the minimum clearance requirements of the Electrical Code. The Jury could have also found that the minimum clearance requirements of the Code were insufficient to render the situation that existed at the time of the accident reasonably safe. The Defendant now argues that it had no notice that this dangerous condition existed at the place of the accident. This contention was not made in the course of the trial. The only contention concerning notice that was made in the trial of the case was that they had no notice of the fact that the antenna was going to be taken down.

This Court does not decide the question as to whether or not the jury did, in fact, believe all of the contentions above set forth, but they certainly could have believed it. If they did believe what they heard, they could have found that the Defendant had actual notice of the existence of the T.V. antenna; that the location of said antenna was in close proximity to a 7,200 volt power line; that the location of the T.V. antenna and power line created an extremely dangerous condition; that the Defendant knew that it was likely that the T.V. antenna would come in contact with the power line and the power line was likely to cause the death of innocent persons. The Jury could have further found from the evidence that the Power Company would not insulate its power line even though it knew it created a life-threatening condition so long as it met the minimum clearance standards of the National Electrical Safety Code.

I am of the opinion that a $1,000,000.00 verdict is not excessive in view of the facts of this case.

This was my reason for originally overruling the Defendant's Motion for a Remittitur. After having considered the matter again, I am still of the opinion that $1,000,000.00 is not excessive. The condition that existed at the time of this accident should not be allowed to exist. A small verdict would not, in my opinion, cause this Defendant to change its practices with reference to taking appropriate steps to correct such situations. Hopefully, a verdict of $1,000,000.00 will cause this Defendant and other power companies to comply with the law and thus save lives.

It is therefore ORDERED, ADJUDGED AND DECREED that the Motion for Remittitur or for a New Trial on the question of damages is overruled.

This the 6th day of November, 1986.

/s/ Carl D. NeSmith

Circuit Judge
30th Judicial Circuit

APPENDIX D

IN THE CIRCUIT COURT FOR
ST. CLAIR COUNTY, ALABAMA

Civil Action No. CV-82-000027

BRENDA LOUISE CANTRELL, etc.

v.

ALABAMA POWER COMPANY, et al.

Decided July 1, 1985

The defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative, For a New Trial or Remittitur, filed April 10, 1985 was argued by the attorneys on June 4, 1985, and was submitted for ruling thereon on said date and taken under advisement by the Court.

After consideration of said Motion, the Court is of the opinion that said Motion is due to be denied.

ORDERED, ADJUDGED AND DECREED that the defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial or Remittitur filed April 10, 1985 be and the same is hereby denied.

This the 1st day of July, 1985.

/s/ Carl D. NeSmith

Circuit Judge

APPENDIX E

IN THE CIRCUIT COURT OF
ST. CLAIR COUNTY, ALABAMA

NO. 82-000027

BRENDA LOUISE CANTRELL

v.

ALABAMA POWER COMPANY

ENTERED MARCH 27, 1985

3/27/85 — Trial of the above styled action having commenced on March 25, 1985. Issue having been joined between the parties. Thereupon comes a jury, to-wit: M. G. Nelson and eleven others, who being duly empanelled, sworn and charged by the Court according to law, before whom the trial of this cause was entered upon and continued from day to day and from time to time.

Now on this the 27th day of March, 1985, said jurors upon their oaths do say:

"We, the jury, find for the plaintiff and against the defendant and assess the plaintiff's damages at one million dollars ($1,000,000.00)

/s/ M.G. Nelson, foreman"

The jury being polled, each and every juror stated that the verdict rendered was the verdict of each and every juror.

ORDERED, ADJUDGED AND DECREED judgment be entered in favor of the plaintiff and against the defendant in the sum of $1,000,000.00. Cost is taxed to the defendant. Execution may issue for said judgment and cost.

/s/ Carl D. NeSmith

JUDGE

APPENDIX F

IN THE SUPREME COURT OF ALABAMA

No. 84-1146

ALABAMA POWER COMPANY

v.

BRENDA LOUISE CANTRELL

Filed August 12, 1987

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Alabama Power Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alabama, overruling the appellant's Application for Rehearing and affirming the judgment of the Circuit Court of St. Clair County, entered in this action on May 22, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ John P. Scott, Jr.

JOHN P. SCOTT, JR.
Attorney for Appellant,
Alabama Power Company

OF COUNSEL:

BALCH & BINGHAM
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

Billy L. Church
CHURCH, TRUSSELL & ROBINSON, P.C.
P. O. Box 504
Pell City, Alabama 35125
(205) 338-2295

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of Appellant's Notice of Appeal to the Supreme Court of the United States upon Mr. John W. Haley, Hare, Wynn, Newell and Newton, 700 City Federal Building, Birmingham, Alabama 35203 (205) 328-5330 and Mr. A. Dwight Blair, Hereford, Blair and Holladay, P. O. Box J, Pell City, Alabama 35125 (205) 884-3440, Attorneys for plaintiff-appellee Brenda Louise Cantrell, by placing a copy of same in the United States mail, properly addressed, with proper postage prepaid, on this the 10th day of August, 1987.

/s/ John P. Scott, Jr.

Attorney for Appellant,
Alabama Power Company

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

No. 84-1146

ALABAMA POWER COMPANY

v.

BRENDA LOUISE CANTRELL

Filed September 19, 1986

APPLICATION FOR REHEARING

Comes Alabama Power Company, Appellant in this action, and respectfully applies to this Court for a rehearing of the issues heretofore presented on appeal.

Alabama Power Company further applies to this Court for rehearing on the following issues:

1. The statutory affirmance penalty imposed under Section 12-22-72, Code of Alabama (1975) is unconstitutional and such statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. The award of punitive damages under Section 6-5-40, Code of Alabama (1975) is unconstitutional in the absence of standards for the imposition of such damages and violates the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

REQUEST FOR ORAL ARGUMENT

Alabama Power Company respectfully requests oral argument in support of its Application for Rehearing. Oral argument has been heretofore denied in this action and is essential in order to permit appellant to express adequately the critical facts and issues not addressed in this Court's decision and errors in such decision which require a full and fair opportunity for hearing.

/s/ John P. Scott, Jr.

John P. Scott, Jr.
Attorney for Appellant
Alabama Power Company

Of Counsel:

John P. Scott, Jr.
Balch & Bingham
P. O. Box 306
Birmingham, AL 35201
(205) 251-8100

Billy L. Church
Church, Trussell & Robinson, P.C.
P. O. Box 504
Pell City, AL 35125

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Application for Rehearing has been served upon the below-named counsel of record by United States mail, postage prepaid and properly addressed on this the 19th day of September, 1986.

Mr. John W. Haley
Hare, Wynn, Newell &
Newton
700 City Federal Building
Birmingham, AL 35203

Mr. A. Dwight Blair
Hereford, Blair &
Holladay
P. O. Box J
Pell City, AL 35125

Honorable Charles A. Graddick
Attorney General
State of Alabama
3120 Hemon Road
Montgomery, AL 36192

/s/ John P. Scott, Jr.
Of Counsel

A-44

IN THE SUPREME COURT OF ALABAMA

No. SC 84-1146

ALABAMA POWER COMPANY,

Appellant,

v.

BRENDA LOUISE CANTRELL,

Appellee.

BRIEF AND ARGUMENT OF APPELLANT, ALABAMA POWER COMPANY ON APPLICATION FOR REHEARING

John P. Scott, Jr.
Balch & Bingham
P. O. Box 306
Birmingham, AL 35201
(205) 251-8100

Billy L. Church
Church, Trussell & Robinson
P. O. Box 504
Pell City, Alabama 35125
(205) 338-2295

Attorneys for Appellant,
Alabama Power Company

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BRIEF AND ARGUMENT OF ALABAMA POWER COMPANY ON APPLICATION FOR REHEARING

This brief in support of Alabama Power Company's (hereinafter APCo's) Application for Rehearing focuses upon the first two issues addressed in this Court's opinion as well as several additional issues. In light of the record in this case as well as the prior opinions of this Court regarding electric utility liability, the *Cantrell* decision on appeal is shocking, confusing and incomprehensible. For the following reasons, this Court is urged to reconsider and re-examine the following issues, along with consideration of oral argument heretofore denied, so that the rule of liability applicable to electric utilities in these cases can return to a fault-standard rather than an insurer-standard based upon strict liability.

I.

THE FACTS IDENTIFIED BY THIS COURT ARE MISSTATED AND DO NOT CREATE A JURY ISSUE

This Court must refocus upon the actual undisputed facts in this case before it can adequately address APCo's rehearing request. This Court's consideration of the facts on appeal seems to have been clouded and influenced inappropriately by the decision in *Alabama Power Company v. Brooks*, 479 So. 2d 1169 (Ala. 1985) upon which Justice Maddox relies purportedly "because the facts of that case

are similar to those of the instant case."[1] The mistake made in concluding that such facts are similar is clear from the following comparison:

Brooks Case	Cantrell Case
1. Power lines were installed and taller utility poles were added to accommodate *large equipment moving around the power lines.* The mining companies operating at this location required the use of large machinery, including extendible, mobile drilling rigs of the type involved in the accident (479 So. 2d at 1171-1172).	1. Power lines were installed using standard construction over 10 years prior to the installation of an antenna. Upon installation of the antenna at a *fixed* location and *attached to a building,* the power lines remained in excess of the applicable safety clearances from the antenna as required under the NESC. (Tr. 24-28; 88-93; 126; 161).
2. APCo representatives *worked in this area* on at least three occasions prior to the accident and an inspection of this line probably *occurred* shortly before the date of this accident. (479 So. 2d at 1174).	2. *No* evidence was presented of any employee of APCo working or being at this location after the antenna was installed. The *only* evidence of APCo's presence *at any time* was following: Q. "Did you from time to time see Alabama Power Company's personnel in the complex?" A. No, sir. Q. Did you *ever* see a meter reader read the meter? A. Yes. (Tr. 150-151).

[1]This erroneous conclusion may have unfortunately influenced this Court to deny oral argument in *Cantrell.* We can only speculate about this since oral argument was denied without explanation even though argument of counsel regarding the facts as well as the law would have benefited the Court.

It is beyond comprehension how this Court can compare these facts and consider these cases to be similar. The *only* similarity is that an uninsulated power line was contacted by something made of metal resulting in personal injury. There is *absolutely no similarity* in the facts bearing on the critical issue in the case — whether APCo should have reasonably anticipated contact by persons pursuing business or pleasure due to actual or constructive notice!

Not only is this comparison misplaced but this Court in its opinion, has misstated facts which were *undisputed.* The facts which were identified as "enough to create a scintilla of evidence" can be addressed as follows:

STATED FACT

> "An aluminum antenna, set up on an apartment building and near an uninsulated power line might reasonably be foreseeable as an object which could be energized if it touched the power line."

APCO RESPONSE

This fact was *undisputed* and does not even address the issue of the duty to insulate. Certainly it is foreseeable that a metal object, such as an antenna, *could be energized* with electricity if it touched a power line. However, the issue is whether such an antenna, *firmly attached* to a building for use, can be reasonably anticipated to contact such line as persons pursue business or pleasure, when such line exists in excess of the distances required by the applicable safety rules. This fact certainly does not represent a scintilla of evidence to impose a duty on a utility. The point is that the simple presence of an antenna within proper safety clearance of a power line does *not* constitute a disputed fact which would support the conclusion that a utility should anticipate that this antenna may contact the power line particularly in the absence of *any evidence of any activity or movement* of any type *near this line* of which APCo knew or should have known.

STATED FACT

"This apartment was on the main street of Springville, Alabama and both the power line and antenna could be clearly viewed from the street."

APCO RESPONSE

Based upon the record, this fact is misstated. There is *no dispute* that the apartment building where this accident happened was *not* on any "main street," even though two *other* buildings of the Elam Apartments were along a "main street" or U.S. Hwy. 11. (Plaintiffs Ex. 1, Defendants Ex. 3, 4 and 8). These trial exhibits show that the accident scene "faced" a side road across from vacant property and was certainly away from viewing by any regular flow of traffic or persons.

STATED FACT

"There are two electric meters, owned by APCo, on the side of the building a few feet from where the antenna was located, and the jury could have found that to examine the meters it would be necessary for anyone walking from the street to pass by the antenna;"

APCO RESPONSE

What are these facts supposed to be evidence of? This Court seems to take great liberty with the record in concluding that these facts offer a scintilla on the issue of APCo's duty to insulate. Because of the lack of any other evidence are we to assume or infer that the APCo employees were regularly looking at this antenna? Even if we assume this, what does the presence of this antenna firmly attached to a building mean to a "meter reader?" If we further assume that the meter reader is such an APCo agent to receive notice of "hazards" involving power lines, are we then supposed to believe that this would support a finding by a jury that a firmly attached antenna within proper

clearance of a power line would be removed by pulling it off its attachment (rather than dismantling it in sections) and dropped into a power line? Is that what this Court means to say are facts upon which reasonable men would differ as to whether there is evidence of "reasonable anticipation" of contact? If that is what this Court means to say, the "*reasonable* anticipation of contact" rule has been eliminated.

STATED FACT

"Testimony was given that APCo meter readers had been seen in the neighborhood;"

APCO RESPONSE

This statement of fact seems to be another expansion of the *real* facts in this case. The *only evidence* about any meter reader came from one witness. The slim and shallow content of this evidence has apparently been *overlooked* by this Court in its apparent effort to find a "scintilla." The testimony, again, is as follows:

Q. "Did you from time to time see Alabama Power Company's personnel in the complex?"

A. No, sir.

Q. Did you *ever* see *a* meter reader read the meter?

A. Yes. (Tr. 150-151). (empahasis added)

The unverified observation by *one witness* of *a* meter reader (unidentified) who read *a* meter (unidentified), at some point in time (undetermined) provides the only basis in the record for finding a "scintilla of evidence" that APCo *knew* of facts sufficient to anticipate contact with its lines. This finding seems to confirm that there are no limits at which this Court will use the scintilla of evidence rule to create a jury issue.

STATED FACT

"The antenna had been in placed about two years."

APCO RESPONSE

This fact is *undisputed* as is the fact that APCo's power line had been so located for years prior to the antenna and both had existed in harmony, without problems, for several years. It is only assumed that this Court must believe that a jury would be warranted in concluding that the *mere presence* of an antenna *firmly attached* to a building was enough for APCo to anticipate its contact with the line. As will be discussed further herein, this conclusion makes APCo a virtual insurer of safety in all cases where an antenna exists anywhere near a power line. It is incomprehensible that this Court intended to so expand the standard of liability in these cases.

From a review of these facts, it becomes apparent that this Court's conclusion that disputed facts existed for resolution by a jury is wrong. The facts that relate to the "reasonable anticipation rule", in fact, are undisputed. Moreover, these facts present no more of a jury issue than those reviewed by this Court in most of the recent electrical contact decisions of this Court. *Foster v. Alabama Power Company,* 395 So. 2d 27 (Ala. 1981); *Alabama Power Company v. Alexander,* 370 So. 2d 252 (Ala. 1979), and *Campbell v. Alabama Power Company,* 378 So. 2d 718 (Ala. 1979). However, this precedent seems to have been forgotten, for the *Cantrell* opinion either disregards or misapplies it.

In *Foster v. Alabama Power Company, supra,* where a 15-year-old boy climbed upon an APCo tower and received electrical shock, this Court found evidence of substantial activity around the base of the tower, including paths made by dirt bikes, presence of garbage and other such evidence. However, this Court concluded that this was *not notice sufficient to create a duty upon APCo to insulate* or guard its wires. In affirming summary judgment for APCo, this Court said:

> In this case, while there was at least a scintilla of evidence that the Power Company might have had reason to know that people were in the area and might be near the tower, there was no evidence from which a

> factfinder could infer that the Power Company had any reason to know that people might be climbing the tower. . . .

395 So. 2d at 31 (emphasis added).

Likewise, in *Campbell v. Alabama Power Company, supra,* this Court affirmed the trial court's entry of summary judgment in favor of APCo due to the *absence* of evidence of notice. In *Campbell,* the plaintiff's decedent was electrocuted when a crane at a construction site came in contact with an uninsulated line. This Court, in affirming the granting of summary judgment, stated the following:

> To establish a breach of duty, notice to APCo, either actual or constructive, of the presence of the crane being used to install storm sewer pipe in close proximity to the power line would have to be shown by Mrs. Campbell. . . .
>
> . . . While the question of notice is one for the jury where there is a factual dispute, . . . if there is no evidence that APCo had or should have had notice of the use of the crane or Joe-Col's employees near the uninsulated power line on Coronado Court, the grant of a summary judgment for APCo was proper.

378 So. 2d at 720-21.

In *Alabama Power Company v. Alexander, supra,* the plaintiff brought an action against APCo for severe injuries sustained when he raised a 37-foot metal pipe from a well and caused the pipe to come in contact with APCo's uninsulated power line. The evidence showed that the power lines were in excess of the clearances required under the applicable safety regulations just as those in *Cantrell.* The plaintiff in *Alexander* contended, as was contended in this case, that APCo had a duty to insulate the wires. This Court, in reversing the failure of the trial court to issue a directed verdict, stated the following:

> In this case, there is no evidence that Alabama Power Company had either actual or constructive notice that well drilling was in progress at a site near their power lines. *Absent this notice,* the Power Company *had no duty to insulate* the wires or take other precautionary measures unless under the totality of the circumstances, the

> Power Company should have reasonably anticipated that persons pursuing business or pleasure might come in contact with the power lines.

370 So. 2d at 254. (emphasis added)

It is incomprehensible that this Court can refuse to consider these cases when considering whether the facts in this case create a jury issue. This Court simply refuses to explain or distinguish these cases and their expressed emphasis on *evidence of notice!* There is little doubt that this Court has heretofore required more evidence to warrant a jury determination of the "reasonable anticipation issue" than was shown in *Cantrell* applying *the same scintilla of evidence rule.*

For example, in *Brooks,* this Court found evidence that APCo had received notice that certain types of equipment were being operated in the area of this line necessitating its raising some of its power lines to provide adequate clearance. In addition, APCo representatives had worked in the shop area on at least three occasions prior to the date of the plaintiff's injury and an inspection probably occurred shortly before the date of contact. Based upon these facts and the nature of the operations in and around the power line in question, the Court concluded that sufficient facts existed for resolution of the issue of notice by the jury.

Also, in *Bush v. Alabama Power Company,* 457 So. 2d 350 (Ala. 1984), this Court found evidence that APCo had been to the accident site to work on the switch located at its system of wires after their inspection and had been to the site to do extensive repairs to the system after Hurricane Frederic came in 1979. The accident occurred less than seven months later. Based upon these facts, the Court concluded that the factual dispute on the issue of notice of APCo was for resolution by the jury.

In *Alabama Power Company v. Irwin,* 260 Ala. 673, 72 So. 2d 300 (1954), it was undisputed that APCo employees had visited the site of the accident six times during the year prior to the accident. Moreover, the power line had been installed by APCo near a well which had been in existence for many years and the Company knew that the well

required periodic maintenance, usually on an annual basis. Under these facts, the Court concluded that sufficient notice existed to warrant a jury verdict.

In *Alabama Power Company v. Smith,* 273 Ala. 509, 142 So. 2d 228 (Ala. 1962), an *engineer* from APCo had visited the site approximately one month before the accident and discussed with the contractor the presence of the wires. Moreover, the contractor had requested that the wires be removed; however, APCo informed him that it was not going to move the wires. The Court affirmed the judgment for the plaintiffs rendered on a jury verdict due to the evidence that supported a reasonable inference that APCo had notice that workmen would be working in dangerous proximity to the uninsulated line.

How then can this Court ignore this precedent and conclude that the facts here created a jury question? Even if this Court refuses to come to grips with the inconsistency in its own decisions perhaps it will consider the decisions of other states which have made some meaningful observations about similar facts being used to impose electric utility liability. Some of these conclusions are important enough to be brought *again* to this Court's attention.

In *Jones v. Aetna Casualty & Surety Co.,* 430 So. 2d 1134 (La. App. 1983), the Louisiana court dealt with a fact situation *truly similar* to the instant case. The accident in *Jones* which resulted in personal injuries occurred as the plaintiff was assisting in the removal of a television antenna when it struck a Gulf States electric power line. The antenna was over 40 feet tall and was about 15 feet away from the 31-foot high power line. Following a trial, the trial court entered a directed verdict in favor of Gulf States which was affirmed on appeal.

In *Jones,* the plaintiff contended that Gulf States was negligent in failing to take precautions to protect against the alleged foreseeable risk that a television antenna of such height would contact its wires. The Court found from the facts that there was a *safe method* of taking the antenna down by dismantling the antenna in sections which would have

alleviated the possibility of contact with the wires.[2] The Court also noted the following:

> Most significant is the fact that there is *nothing* to indicate in this case, unlike the other cases cited, that Gulf States or its employees had *any knowledge that this television antenna was to be removed.* In fact, there is *no evidence* that *Gulf States was ever made aware of the presence of this antenna* 15 feet away from its power lines. Appellant argues that employees of Gulf States came out to the trailer park on occasions and a few occasions before had disconnected the trailer's power from a panel 20 feet away and therefore should have noticed the antenna and surmised that it was to be removed. We do not find that argument persuasive, as it *places an unreasonable burden on Gulf States* to *locate every object which could conceivably fall on its power lines and remove it.* Robert Rareck testified that he was aware of the danger in removing the antenna so close to the lines, however, he did not at any time inform Gulf States of the presence or the impending removal of the antenna, nor ask for any assistance by Gulf States.
>
> Under these circumstances, it is our opinion that Gulf States discharged its duty to appellant by placing its lines well above the danger point of human contact, even without insulation, when it was not reasonably foreseeable that such an accident would occur. *Without any prior knowledge of the antenna or its removal,* Gulf States cannot be held liable for a situation which was created by the parties and which they knew to be a dangerous situation.

430 So. 2d at 1137-38 (emphasis added).

The Supreme Court of Mississippi dealt with alleged "meter reader notice" in *Delta Electric Power Association v. Burton,* 126 So. 2d 258 (Miss. 1961). This wrongful death case involved a woman who was electrocuted while attempting to remove an antenna near a power line. While the Mississippi court found sufficient evidence of notice by the

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[2]The *Cantrell* opinion makes no mention of the fact that a simple, reasonable and safe method for removal of this antenna existed by dismantling the antenna in sections which would have avoided *any possibility* of contact. (Tr. 28-30; D. Ex. 1 and 2).

utility to warrant a jury verdict, the Court, upon rehearing made the following statement:

> It is *not* decided by the Court that notice to a meter reader is notice to a company of technical defects in maintaining an electrical distribution line *unless* he is charged with a duty of inspecting and repairing the facilities. . . . The statement in the opinion regarding knowledge of the meter readers was a correct statement of fact, but was only one of the circumstances regarding notice of the condition.

126 So. 2d 15 866. (emphasis added)

It is apparent that the Mississippi court has reasonably concluded that it will *not* consider the *mere presence of a meter* reader in the area as enough evidence to create a jury issue on foreseeability. This conclusion represents a well reasoned approach to this issue and should be persuasive to this Court in *Cantrell.*

Because Alabama's rule of reasonable anticipation is a foreseeability test, it is also important to note the conclusion of the U.S. Court of Appeals for the Fifth Circuit's statement in *Mosley v. Southwestern Electric Power Co.,* 659 F. 2d 680 (5th Cir. 1981):

> Plaintiffs have only shown that a fatal accident is within the *range of possibilities.* As *Brooks* shows, *foreseeability requires more.*

659 F. 2d at 683 (emphasis added).

Likewise, the *Cantrell* accident in this case was within the range of possibilities but certainly *not* one *reasonably anticipated* or foreseen.

In view of all of this precedent, how then can this Court, without dissent, conclude that disputed facts exist upon which "reasonable" men could differ? If this Court intends to create strict liability and destroy the fault concept in electrical shock cases, it should simply say so rather than rely upon the scintilla rule as the justification for affirming this verdict.

II.

THIS OPINION PURPORTS TO ESTABLISHES A NEW "STANDARD" IN ELECTRICAL CONTACT CASES TO JUSTIFY THE TRIAL COURT'S REFUSAL TO GIVE COMPLETE INSTRUCTIONS ON ALL ISSUES

This Court now says that "notice is not the only possible ground on which the duty to insulate arises." Citing *Alabama Power Company v. Alexander,* 370 So. 2d 252, 254 (Ala. 1979), this Court says:

> Two different standards are clearly established. Even in the absence of actual notice to APCo, if the evidence, under a totality of the circumstances, showed that APCo should have reasonably anticipated that persons, pursuing business or pleasure, might come in contact with the power lines, the duty to insulate arose.

What does "totality of the circumstances" mean in this context? Certainly this is not "new law" for *Alexander* was simply relying upon prior law. However, under this Court's interpretation of this "standard," every electrical contact case would become one for resolution by the jury? If not, what "standard" has the Court created to guide a lower court or itself?

In "creating" this new standard, it is apparent that this Court has misread *Alexander,* particularly in view of the other declarations of this Court about what is required to impose a duty to insulate:

> In other words, Alabama Power must either insulate its electrical lines, or locate them in a position where they pose no danger to human life. However, the duty to insulate *does not arise absent notice, actual or constructive,* that persons may come into contact with the uninsulated wires.

Bush v. Alabama Power Company, 457 So. 2d 350, 353 (Ala. 1984) (emphasis added); *Alabama Power Co. V. Brooks,* 479 So. 2d 1169 (Ala. 1985).

> To establish a breach of duty, *notice to APCo, either actual* or *constructive,* of the presence of the crane being used to install storm sewer pipe in close proximity to the

> power line *would have to be shown* by Mrs. Campbell. Any notice furnished to APCo employee *would not be notice to APCo "unless it is with respect to the very matter which the agent is employed to transact for the principal, and unless it comes to him while so engaged."*

Campbell v. Alabama Power Company, 378 So. 2d 718, 720 (Ala. 1979). (emphasis added)

None of these decisions, including *Alexander* provide a basis for this Court to conclude *now* that *notice is not required* to establish a duty to insulate. In fact, the rule, which has been repeatedly stated, requires evidence of *actual or constructive notice.* It does not say nor can it be construed to mean that notice is not required under a "totality of circumstances" standard.

Alexander must be read for what it says: "Absent *this notice* (i.e. absent actual or constructive notice that that *particular activity was taking place* (removal of antenna), there is no duty to insulate unless, "under the totality of circumstances," (which must include evidence of actual *or* constructive notice), APCo should have reasonably anticipated the contact. Clearly the Court was saying that circumstances may exist where notice of other similar activity or the likelihood of such activity may exist for the duty to insulate to arise. It was not saying that "reasonable anticipation" can be shown *without* actual *or* constructive notice.

In fact, this Court has already restated what was meant in *Alexander* in its opinion in *Foster v. Alabama Power Company, supra:*

> As stated in *Alexander,* 370 So. 2d at 254, the Power Company must have either actual or constructive *notice of the presence of the person* who is likely to be injured *and "absent this notice,* the Power Company [has] no duty to insulate the wires or take precautionary measures unless under the totality of the circumstances, the Power Company should have reasonably anticipated that persons, pursuing business or pleasure, might come in contact with the power lines."

395 So. 2d at 31.

Based upon these statements, it is now incredible that this Court attempts to justify its affirmance in *Cantrell* by concluding that "reasonable anticipation" can be established *without* actual or constructive notice. This is a complete rewrite of the Alabama law, a misreading of *Alexander* and the last step toward establishing a strict liability-no fault standard for antenna contact cases.

If this Court, upon rehearing, will focus on its failure to follow the long established "reasonable anticipation rule" and its requirement of notice and reconsider what *Alexander* and other decisions *really* say, it *must* conclude that the trial court in this case erred in its charge on the duty to insulate.[3] How else can a trial court fairly and impartially apply the law than by being given charges which explain *all* of the applicable law rather than giving a general statement without explanation? While this Court has repeatedly said that complete charges are required, it pays "lip service" to the requirement by refusing to require the *Cantrell* trial court to charge on what must be proven in order for the jury to conclude that the "reasonable anticipation rule" was satisfied. A simple statement of the "reasonable anticipation rule" is *not* a complete statement of the law upon which a jury can be expected to act according to the law.

The trial court in *Cantrell* certainly failed to make any mention of notice in its charges to which APCo *is absolutely entitled* under these decisions. Otherwise, the notice rule is meaningless and the reference to this requirement in prior decisions was an exercise in futility for this Court has apparently decided to ignore it.

In addition, this Court apparently tries to avoid the mandate of its decisions in *Campbell v. Alabama Power Company, supra,* and *Sullivan v. Alabama Power Company,* 246 Ala. 262, 20 So. 2d 224, 230 (1944) wherein it was made

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[3]The trial court charged the jury that the duty to insulate arose "wherever it may be reasonably anticipated that persons, pursuing business or pleasure, may come in contact therewith." (Tr. 191) Despite APCo's request, the Court gave *no* charge explaining this rule or making any reference to actual *or* constructive notice.

clear that any notice to an APCo employee is *not* notice "*unless* it is with respect to the very matter which the agent is employed to transact for the principal and unless it came to him while so engaged."

If this Court is convinced that the jury in *Cantrell* would be justified in concluding that *a meter reader received notice* of some alleged hazard "by passing by the antenna while walking from the street," and this was evidence from which a duty to insulate may arise, how can it not be equally compelled to recognize that the "notice" requirements set forth in *Campbell* and *Sullivan* must be applied and charged to the jury as the applicable law? How can this Court simply *refuse* to address this issue when its *own rendition of the facts makes this an issue* for the jury? This Court's opinion, as presently written, makes a sham of the oft stated requirement that the parties are entitled to instructions on all issues. Perhaps this Court is now saying through *Cantrell* that the jury needs no guidance in rendering its decision based upon the evidence. This Court's refusal to address these essential issues is unexplained and, again, incomprehensible.

III.

THIS OPINION MAKES APCO AN INSURER AND IMPOSES STRICT LIABILITY IN ELECTRICAL CONTACT CASES

Perhaps this Court has not truly considered the certain impact of this decision in future electric utility cases involving uninsulated power lines. It is urged that upon reflection this Court will reconsider this decision in light of its certain impact upon electrical contact cases.

Other courts which have considered similar facts have stated that it is an *unreasonable burden* to impose upon a utility to make it responsible for locating every metal object that could conceivably fall or be moved into its power lines and for insulating any such line that may be contacted. *Jones v. Aetna, supra; Mosley v. Southwestern Electric Power Company, supra.* The Cantrell decision places this *unreasonable burden*

on APCo by simply saying that it is subject to liability where it allows an antenna to exist near a power line, even though it is firmly attached to a building and can be removed safely to avoid contact.

Cantrell also says that a utility will be deemed to have reasonably anticipated contact with a power line, where a meter reader has been in an area near an antenna. In the absence of other evidence, this conclusion is nothing more than the establishment of an insurer standard for electric utilities in Alabama. This Court is now saying that APCo will be held liable for *all possibilities of electrical contact* rather than contact that can be "reasonably anticipated."

This Court must consider whether it means and intends to follow what it has repeatedly said:

> "Since an electric power company is not an insurer, it is *not* under an obligation to so safeguard its wires that *by no possibility can injury result* therefrom."

Alabama Power Company v. King, 280 Ala. 119, 190 So. 2d 674 (1966); *Alabama Power Company v. Berry,* 259 Ala. 228, 48 So. 2d 231 (1950); *Alabama Power Company v. Smith,* 273 Ala. 509, 142 So. 2d 228, 235 (1962); *Alabama Power Company v. Irwin,* 260 Ala. 673, 72 So. 2d 300 (1954).

> "Electric companies are *not* insurers of the public safety and the law does not impose strict liability for all accidents involving their power lines."

Alabama Power Company v. Alexander, supra, p. 254, *Alabama Power Company v. Tatum,* 293 Ala. 500, 306 So. 2d 251 (1975).

It is strongly urged that this Court will consider what it has done in *Cantrell* and will reconsider, reverse and render this case based upon the *actual evidence* and not offer the scintilla rule as a basis for supporting a jury verdict in a case of no liability.

IV.

THE TEN PERCENT AFFIRMANCE PENALTY UNDER SECTION 12-22-72, CODE OF ALABAMA OF 1975 VIOLATES THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION

If the jury verdict is affirmed in this case, APCo, as appellant, will be subjected to an automatic nondiscretionary penalty of 10% of the money judgment affirmed. There is no rational basis for this penalty imposed under Section 12-22-72, Code of Alabama of 1975, for it overinclusively and severely discourages meritorious appeals, particularly in wrongful death actions whose damages are punitive and without reasonable standards, while it is supposedly designed to prevent frivolous appeals. Moreover, the penalty underinclusively applies only to defendant-appellants against whom a money judgment has been assessed. Consequently, the statute discriminates against and denies equal protection to unsuccessful money judgment appellants. This denial of equal protection violates the Fourteenth Amendment to the United States Constitution and has no rational relationship to any legitimate state interest.

The Supreme Court of the United States spoke to a similar penalty statute in *Lindsey v. Normet,* 405 U.S. 6 (1972). The Court found that "a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession [during the pendency of the appeal] . . . " 405 U.S. at 77. However, the Supreme Court unanimously struck down as "arbitrary and irrational," the Oregon statute in issue which, notwithstanding adequate statutory protections to secure the fruits of a lower court victory, required a specific class of defendants, tenants, to post a double bond in order to appeal from a judgment in favor of landlords. Under the Oregon statute, if the lower court judgment were affirmed on appeal, the landlord would be "automatically entitled to

twice the rents accruing during the appeal without proof of actual damage . . . " Moreover, the double-bond requirement did not discourage all frivolous appeals. *Id.* at 78. Under §12-22-72, Code of Alabama (1975), a successful plaintiff-appellee likewise receives a 10% windfall totally unrelated to any costs which they might have incurred, or damages they might have suffered, and plaintiff-appellants are free to take whatever frivolous appeals they wish.

As the *Lindsey* decision declared, a State may act "to discourage patently insubstantial appeals . . . if [its] rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." 405 U.S. at 78 (emphasis added). Section 12-22-72 fails all of these tests. Accordingly, the 10% affirmance penalty should not be applied in this case since it is based upon an unconstitutional state statute.

V.

THE PUNITIVE DAMAGE VERDICT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Notwithstanding the remand of the issue relating to the excessiveness of the jury verdict below, APCo requests this Court to consider the fact that Alabama's wrongful death statute allows recovery of only punitive damages without any standards to guide a jury in the assessment of those damages. The exclusive punitive damage recovery in death actions, which is now limited to Alabama, violates the Due Process Clause of the Fourteenth Amendment because it releases the issue of the amount of damages to the unbridled discretion of a jury without any clearly defined limitation by which it can fairly and justly assess such damages.

Moreover, the imposition of the punitive damage award in the amount of $1 million in *Cantrell* amounts to an excessive fine for negligent homicide far in excess of the maximum criminal penalty allowed by Alabama law.[1] The

[1]Sections 13A-5-12 and 13A-6-4, Code of Alabama of 1975 impose a maximum criminal penalty of $2,000 for negligent homicide.

lack of any relationship between the $1,000,000 punitive damage verdict, the facts in this case which are alleged to be simple negligence and the maximum criminal fine which could be imposed under law, presents a substantial question and one, upon reflection, that presents a clear violation of the Eighth and Fourteenth Amendments to the United States Constitution.[2]

CONCLUSION

For the foregoing reasons, this Court must be compelled to re-examine its decision, recognizing the substantial impact certain to result from allowing this decision to stand on its facts, reverse its opinion and render a decision in accordance with Alabama law.

Respectfully submitted,

/s/ John P. Scott, Jr.

John P. Scott, Jr.
Attorney for Appellant,
Alabama Power Company

[2]See *Aetna Life Insurance Co. v. Lavoie*, 54 U.S.L.W. 4381, 4385-86 (1986) wherein the U.S. Supreme Court declared that this issue is important and should be resolved in an appropriate setting. Certainly the case presents a classic case for resolution of this constitutional issue in view of the excessive verdict rendered in a case of alleged simple negligence.

OF COUNSEL:

BALCH & BINGHAM
John P. Scott, Jr.
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

CHURCH, TRUSSELL & ROBINSON
Billy L. Church
P. O. Box 504
Pell City, Alabama 35125

REQUEST FOR ORAL ARGUMENT

It is strongly urged that this Court afford this Appellant the opportunity to orally argue the issues and facts raised herein because of their importance and the likely impact of this decision upon future electrical contact cases. This Court has heretofore denied this opportunity to the Appellant when such argument could possibly have avoided some of the misstatements now contained in the Court's opinion. A full and fair opportunity for oral argument will allow this Appellant to emphasize the confusion resulting from the opinion of this Court and afford this Court the best opportunity for a complete assessment of the potential results of this decision and its likely step toward establishing a strict liability standard in electrical contact cases.

/s/ John P. Scott, Jr.

John P. Scott, Jr.
Attorney for Appellant,
Alabama Power Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of Appellant has been served upon Mr. John Haley, Hare, Wynn, Newell & Newton, 700 City Federal Building, Birmingham, Alabama 35203; Mr. Dwight Blair, 1711 Cogswell Avenue, P. O. Box J, Pell City, Alabama 35125 and Honorable Charles A. Graddick, 3120 Hemon Road, Montgomery, Alabama 36106 by mailing a copy to these attorneys by First Class Mail, postage prepaid and properly addressed on this the 3rd day of October, 1986.

/s/ John P. Scott, Jr.

Attorney for Appellant,
Alabama Power Company

APPENDIX H

IN THE CIRCUIT COURT FOR
ST. CLAIR COUNTY, ALABAMA

Civil Action No. CV-82-000027

BRENDA LOUISE CANTRELL, etc.

v.

ALABAMA POWER COMPANY, et al.

Filed April 10, 1985

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL OR REMITTITUR

Defendant, Alabama Power Company, moves the Court, by this Motion, to set aside the verdict and judgment entered in the above-styled action on March 27, 1985, and to enter judgment in favor of the defendant in accordance with the defendant's Motion for Directed Verdict made at the conclusion of the plaintiff's evidence and at the conclusion of the defendant's evidence or, in the alternative, moves the Court to set aside the verdict against the defendant and in favor of the plaintiff and to grant a new trial or remittitur on the following grounds, separately and severally, as amended:

1. The verdict of the jury was so excessive as to shock the conscience and was the result of bias, passion, prejudice or other improper motive.

2. The amount of damages awarded by the jury is excessive under the simple negligence claims stated and facts presented in this action for wrongful death.

3. The amount of damages awarded by the jury is excessive in view of the lack of evidence of notice to or knowledge of the defendant, Alabama Power Company, of the existence of an antenna or the activity involving the removal of such antenna by the decedent in proximity to its power lines.

4. The damages awarded by the jury were the result of disregard of the Court's charge on the proper measure of damages in this action.

5. The trial court erred in refusing to grant the defendant's Motion for Directed Verdict at the close of the evidence offered by the plaintiff and at the close of the evidence offered by the defendant.

6. The verdict of the jury was not supported by the great preponderance of the evidence.

7. The verdict of the jury was contrary to the great preponderance of the evidence.

8. The trial judge erred in its charge to the jury in refusing to charge regarding the notice to Alabama Power Company required and to whom such notice must be given in order to establish a duty to insulate under Alabama law.

9. The Court erred in refusing to give written charge No. 11 requested by the defendant:

> I charge you that there is no duty upon Alabama Power Company to safeguard its wires from contact at a place where it cannot be reasonably anticipated that any person would likely or probably come in contact therewith or be injured thereby.

10. The Court erred in refusing to give written charge No. 14 requested by the defendant:

> I charge you that before you can award the plaintiff any damages in this case, you should be reasonably satisfied from the evidence that the conduct of Alabama Power Company was such conduct as deserves the imposition of punishment as a deterrent, and if you are reasonably satisfied from the evidence that the conduct of Alabama Power Company does not deserve punishment, then you cannot return a verdict in favor of the plaintiff and against the defendant, Alabama Power Company.

11. The Court erred in refusing to give written charge No. 17 requested by the defendant:

> I charge you that the only damages which may be recovered in this action are entirely punitive and must be based upon the amount of wrongdoing, if any, on the part of Alabama Power Company. In determining whether there should be any damages awarded in this case, you are not to consider the monetary value of the life of the deceased nor are you to consider an amount to compensate the family or wife of the deceased, Guyland Cantrell, for any financial loss sustained as a result of such death. Your verdict, if any, must be directly related to the alleged wrongdoing and culpability, if any, of Alabama Power Company.

12. The Court erred in refusing to give written charges No. 19, 21 and 22 requested by the defendant.

13. The Court erred in giving the following written charge No. 10 requested by the plaintiff:

> The three elements of contributory negligence in cases of this kind are that the party charged with contributory negligence (1) had knowledge of the existence of the dangerous condition, and (2) with appreciation of such danger (3) failed to exercise care for his own safety by putting himself in the way of such known danger.

14. The Court erred in giving the following written charge No. 11 requested by the plaintiff:

> I charge you members of the jury that before you can find the plaintiff's husband to be guilty of contributory negligence, you must be reasonably satisfied from the evidence that he appreciated the danger involved in taking the antenna down, and thereafter failed to conduct himself as a reasonably prudent person would have under the knowledge that he had and the surrounding circumstances.

15. The Court erred in given the following written charge No. 13 requested by the plaintiff:

> I charge you members of the jury that the duty of an electric company, in conveying a current of high po-

tential, to exercise commensurate care under the circumstances, requires it to insulate its wires, and to use reasonable care to keep the same insulated, wherever it may reasonably be anticipated that persons, pursuing business or pleasure, may come in contact therewith.

16. The Court erred in giving the following written charge No. 15 requested by the plaintiff:

> I charge you members of the jury that the Alabama Power Company must locate its electrical lines in a position that they pose no danger to human life, and to insulate its electrical lines wherever it may reasonably anticipate that persons, pursuing business or pleasure, may come in contact therewith.

17. The Court erred in denying and overruling defendant's Motion in Limine regarding plaintiff's reference to, questioning on and comment upon Reports of the U.S. Product Safety Commission concerning accidents involving outdoor antennas.

18. The Court erred in denying and overruling defendant's Motion in Limine regarding admission of U.S. Product Safety Commission Reports concerning accidents involving outdoor antennas.

19. The Court erred in overruling defendant's objections to questions propounded to and testimony of the plaintiff's witnesses, Roy Hicks and John Sims, which concerned U.S. Product Safety Commission Reports, referred to in defendant's Motion in Limine, which the Court denied.

20. The Court erred in overruling defendant's objections to questions of the witness, John Sims, which invaded the province of the jury and were opinions on the ultimate issues of fact and/or law.

21. The Court erred in overruling defendant's objections to questions propounded to and opinions elicited from the witness, John Sims, which opinions were not based upon proper hypothetical questions containing facts to justify the giving of such opinions, were based upon facts not in evidence and/or not shown to be based upon personal knowledge.

22. The Court erred in sustaining objections by the plaintiff to other questions propounded by the defendant to witnesses, which rulings will be set forth with particularity when the complete transcript of the evidence is prepared.

23. The Court erred in overruling objections of the defendant to certain questions propounded by the plaintiff to witnesses, which rulings will be set forth with particularity when the complete transcript of the evidence is prepared.

24. That several of the jurors, including the foreman, who participated in the rendering of the verdict in this case, demonstrated bias, prejudice and partiality toward the plaintiff and against the defendant, Alabama Power Company, so to demonstrate that the verdict in this action was reached as a result of improper motives and factors warranting the verdict to be set aside or a remittitur.

/s/ John P. Scott, Jr.

Attorney for Defendant,
Alabama Power Company

Of Counsel:

Balch & Bingham
P. O. Box 306
Birmingham, Alabama 35201

Church, Trussell & Robinson, P.C.
P. O. Box 504
Pell City, Alabama 35125

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion has been served upon the below-named counsel of record by United States mail, postage prepaid and properly addressed on this the 10th day of April, 1985:

Mr. John W. Haley
Hare, Wynn, Newell and Newton
700 City Federal Building
Birmingham, Alabama 35203

Mr. A. Dwight Blair
1711 Cogswell Avenue
P. O. Box J
Pell City, Alabama 35125

/s/ John P. Scott, Jr.
Of Counsel

APPENDIX I

IN THE CIRCUIT COURT FOR
ST. CLAIR COUNTY, ALABAMA

Civil Action No. 82-000027

BRENDA LOUISE CANTRELL, etc.

v.

ALABAMA POWER COMPANY, et al.,

ACCEPTANCE AND WAIVER

Charles A. Graddick, Attorney General of the State of Alabama, acknowledges service of the Petition for New Trial or Remittitur on Remand in the above-styled cause pursuant to Section 6-6-227 *Code of Alabama 1975* and waives further notice of proceedings in the trial court in this action.

Respectfully submitted,

CHARLES A. GRADDICK
Attorney General

By: /s/ Rosa H. Davis
ROSA H. DAVIS
Assistant Attorney
General

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Acceptance and Waiver this the 7th day of October, 1986 by placing a copy of same in the United States Mail, postage prepaid and properly addressed as follows:

Hon. John P. Scott, Jr.
Balch & Bingham
P.O. Box 306
Birmingham, Alabama 35201

Hon. John W. Haley
700 City Federal Building
Birmingham, Alabama 35203

Hon. A. Dwight Blair
P.O. Box J
Pell City, Alabama 35125

Hon. Billy L. Church
P.O. Box 504
Pell City, Alabama 35125

/s/ Rosa H. Davis
ROSA H. DAVIS
Assistant Attorney General

ADDRESS OF COUNSEL:

OFFICE OF THE ATTORNEY GENERAL
ALABAMA STATEHOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130-1601

APPENDIX J

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

Civil Action No. CV-82-0847

BRENDA LOUISE CANTRELL, as Administratrix of the Estate of Guyland Dale Cantrell, Deceased

v.

ALABAMA POWER COMPANY, a corporation, et al.

Filed February 25, 1982

SUMMONS

This service by certified mail of this summons is initiated upon the written request of Plaintiff's attorney pursuant to the Alabama Rules of Civil Procedure.

NOTICE TO: Alabama Power Company

The Complaint which is attached to this summons is important and you must take immediate action to protect your rights. You are required to mail or hand deliver a copy of a written Answer, either admitting or denying each allegation in the complaint to, John W. Haley, the lawyer for the Plaintiff, whose address is 700 City Federal Building, Birmingham, Alabama 35203. THIS ANSWER MUST BE MAILED OR DELIVERED WITHIN THIRTY (30) DAYS FROM THE DATE OF DELIVERY OF THIS SUMMONS AND COMPLAINT AS EVIDENCED BY

THE RETURN RECEIPT, OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT. You must also file the original of your answer with the Clerk of this Court within a reasonable time afterward.

/s/ Polly Conradi
CLERK OF COURT

DATE: February 25, 1982

COMPLAINT

1. The Plaintiff, Brenda Louise Cantrell, is the duly appointed Administratrix of the Estate of her deceased husband, Guyland Dale Cantrell.

2. The Defendant, Alabama Power Company, is a corporation incorporated in the State of Alabama and engaged in the sale and distribution of electricity.

3. On or about the 6th day of January, 1982, Guyland Dale Cantrell was upon the premises of his brother's home located in Springville, St. Clair County, Alabama, having been invited there by his said brother.

4. While working along with his brother to remove a television antenna, said television antenna came in contact with a high power electric line owned, installed and maintained by the Defendants, Alabama Power Company and Defendants "A" through "F".

5. Plaintiff avers that the Defendant, Alabama Power Company and Defendants "A" through "F" negligently installed, and negligently maintained said power lines.

6. Plaintiff avers that the negligence and wrongful conduct of Alabama Power Company and each of the other Defendants designated as "A" through "F", proximately caused the death of Guyland Dale Cantrell.

7. Plaintiff further avers that the negligence and wrongful conduct of each of the Defendants combined and

concurred and as a proximate result of such combined and concurred negligence, Guyland Dale Cantrell was killed.

WHEREFORE, Plaintiff demands judgment against the Defendants in the sum of One Million and no/100 ($1,000,000.00) Dollars plus costs.

HARE, WYNN, NEWELL
& NEWTON
Attorneys for Plaintiff

By: /s/ John W. Haley

JOHN W. HALEY
700 City Federal
Building
Birmingham, Alabama
35203
Telephone No. 328-5330

By: /s/ Alex W. Newton

Plaintiff demands trial by jury.

/s/ John W. Haley
OF COUNSEL

Plaintiff's Address:

P.O. Box 73
Springville, Alabama 35136

Defendant's Address:

15 South 20th Street
Birmingham, Alabama 35233

Supreme Court, U.S.
FILED
SEP 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-294

IN THE

Supreme Court of the United States

October Term, 1987

ALABAMA POWER COMPANY,
Appellant,

v.

BRENDA LOUISE CANTRELL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS

* JOHN W. HALEY
FRANCES H. HARE, JR.
JAMES O. HALEY
HARE, WYNN, NEWELL & NEWTON
700 City Federal Building
Birmingham, Alabama 35203
(205) 328-5330

Attorneys for Appellee

* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether a federal claim which was not presented to the Supreme Court of Alabama by an application for rehearing after the affirmance of the amount of damages, and which was not passed upon by that court, is within this Court's jurisdiction.

2. Whether an Alabama statute which increases the amount of damages awarded in civil cases if a judgment is superseded and affirmed on appeal, and which has since been abrogated by the state legislature, raises a substantial federal question.

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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-294

ALABAMA POWER COMPANY,
Appellant,

v.

BRENDA LOUISE CANTRELL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, Appellee moves to dismiss this appeal on the grounds that (1) the federal question sought to be reviewed was not timely and properly raised before the Supreme Court of Alabama and was not passed on by that court; and (2) the federal question presented is not substantial.

STATEMENT OF THE CASE

In this case, Alabama Power Company seeks this Court's review of the constitutionality of Ala. Code § 12-22-72 (1975). On March 27, 1985, the Circuit Court of St. Clair County, Alabama, entered judgment against Alabama Power Company. App. E, A-37.[1] The Circuit Court denied Alabama Power Company's post-judgment motions on July 1, 1985. App. D, A-36. After appeal, the Supreme Court of Alabama issued its first opinion on September 5, 1986, affirming liability but remanding to the trial court the issue of excessiveness of damages. App. A, A-2. Alabama Power Company's application for rehearing — filed September 19, 1986 — raised, *inter alia*, the issue of the constitutionality of § 12-22-72 even though the Supreme Court of Alabama had not yet affirmed the judgment, i.e., the issue of amount of the judgment was not yet decided. App. G, A-41.

On November 6, 1986, the Circuit Court issued an opinion pursuant to the remand instructions of the Supreme Court of Alabama and again ordered that Alabama Power Company's post-judgment motions be denied. App. C, A-31. The Supreme Court of Alabama issued its second of two opinions on May 22, 1987. App. B, A-13. The only issue ruled on was whether the Circuit Court's refusal to grant a new trial or remittitur was supported by the record. The Supreme Court of Alabama affirmed, affirming the judgment (i.e., the amount of the judgment) for the first time. Alabama Power Company did not exercise its right to file an application for rehearing within 14 days of the opinion of May 22, 1987. See Rule 40, Ala.R.App.P. The Supreme Court of Alabama issued its certificate of judgment on June 9, 1987, and the certificate contained the assessment of the 10% damages required by § 12-22-72 when a money judgment is superseded and affirmed. App. B, A-12. The Supreme Court of Alabama did not in its opinions address the issue of the constitutionality of § 12-22-72.

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[1] "App." refers to the Appendix to the Jurisdictional Statement.

ARGUMENT

I. The Federal Claim Raised By Alabama Power Company Was Neither Properly Presented To Nor Passed Upon By The Supreme Court of Alabama

The explication of this argument requires an initial discussion of a recently announced Supreme Court of Alabama procedure colloquially known as "*Hammond* remands." On July 11, 1986, in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), the Supreme Court of Alabama announced a new policy applicable to cases in which the issue of excessiveness or inadequacy of a verdict is raised on motion for new trial and on appeal. The Alabama court now requires that trial judges state in writing their reasons for granting or denying a new trial or remittitur on the ground of excessiveness or inadequacy of the verdict. If the trial judge has not written such an opinion, the Supreme Court of Alabama may remand the case to the trial judge for further consideration and for a written opinion on the issue.

The case at bar is one example of a "*Hammond* remand" case. In *Hammond*-type cases, the initial opinion of the Supreme Court of Alabama adjudicates issues relating to liability, i.e., all issues other than ones concerning excessive or inadequate damages. If the court affirms liability, if excessiveness or inadequacy of the verdict was raised as an issue in the trial court and in the appellate court, and if the trial judge did not adequately state his reasons for adjudicating the post-judgment motion, then the Supreme Court of Alabama will affirm in part (on liability) and remand with directions (for the trial judge to state reasons). For the procedure in the present case, see App. A, A-2 at A-11. The judgment of the trial court is not fully affirmed by the first opinion because the amount of damages has not yet been settled.

Alabama Power Company's application for rehearing of September 19, 1986, App. G, A-41, raised all issues previously briefed and two new issues: the constitutionality of § 12-22-72; and an Eighth Amendment claim (held by the

Supreme Court of Alabama to be untimely raised — App. B, A-13 at A-21). The issues in that application for rehearing could logically only relate to issues adjudicated by the opinion of September 5, 1986. The Supreme Court had not in September 1986 decided the damages issue, thus the judgment had not yet been wholly affirmed. As of September 19, 1986, there was no issue concerning § 12-22-72, and Alabama Power Company's argument on that issue was premature. The brief of Alabama Power Company in support of its application for rehearing implicitly recognizes that the issue was not ripe. It began its argument on the point by stating, "*If* the jury verdict is affirmed in this case, APCo, as appellant, will be subjected to [§12-22-72]." App. G, A-44 at A-63 (emphasis added). Alabama Power Company recognized that the judgment had not yet been affirmed.

The judgment was not affirmed until the opinion of May 22, 1987. App. B, A-13. That opinion did not discuss § 12-22-72 because the 10% damages statute was not drawn into issue until the amount of damages was affirmed. By failing to file an application for rehearing within 14 days of May 22, 1987, and raising the issue relative to § 12-22-72, Alabama Power Company failed to timely or properly raise the federal question it seeks to raise in this Court. Rule 40, Ala.R.App.P., provides that, "All applications for rehearing . . . must be filed with the clerk of the court within 14 days (two weeks) after the rendition of the judgment . . . "

Appellee Cantrell agrees with Alabama Power Company's assertions that the past practice of the Supreme Court of Alabama establishes that the proper procedure by which to question the constitutionality of § 12-22-72 is the filing of a timely application for rehearing after affirmance of the judgment. The judgment was not affirmed until May 22, 1987, and Alabama Power Company did not file an application for rehearing. Note that the disposition of the September 5, 1986, opinion, was "AFFIRMED, IN PART," and the disposition of the May 22, 1987, opinion was "AFFIRMED." App. A, A-22 at A-11, and App. B, A-13 at A-22.

In its Jurisdictional Statement, at page 2, Alabama Power Company twice refers to the order of May 22, 1987, as "affirming" the "judgment" or "decision" of the trial court. Then it asserts, "The penalty was not part of any appealable judgment until that time [May 22, 1987]." At page 5, it is said that the 10% damage statute "was not at issue or reduced to any appealable order until that judgment was affirmed." It is true that Alabama Power Company raised the issue in *an* application for rehearing, but appellee asserts the § 12-22-72 issue must be raised in an application for rehearing filed within 14 days after the *affirmance* of the judgment (i.e., May 22, 1987). The Alabama cases cited, at pages 5-7 of the Jursidictional Statement, for the proposition that § 12-22-72 issues are properly raised by application for rehearing are all pre-*Hammond* cases where there was just one appellate opinion, thus only one application for rehearing. In *Hammond*-type cases, the first opinion and first rehearing relate only to liability issues; there is a second opinion relative to damages, and it is only that second opinion which "affirms" the judgment. Only a second application for rehearing filed after the opinion that affirms damages can raise an issue as to § 12-22-72. Alabama Power Company failed to file such a second application for rehearing.[2] The Supreme Court of Alabama recognizes the propriety of filing an application for rehearing following the second opinion (the opinion upholding the amount of damages and *affirming* the judgment) in a *Hammond*-type case. In early September 1987, five such "second" applications for rehearing were pending in the Supreme Court of Alabama.[3]

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[2] At page 7 of its Jurisdictional Statement, Alabama Power Company argues Mississippi procedure by analogy. It claims that issues concerning Miss. Code Ann. § 11-3-23 (Supp. 1986) "are appropriately raised by way of a post-affirmative motion in that court." Again, appellee points out that Alabama Power Company filed no "post-affirmative motion" subsequent to the affirmance of May 22, 1987.

[3] *Harmon v. Motors Ins. Corp.*, Alabama Supreme Court Case Numbers 83-1406, 84-8 and 84-9, first opinion July 11, 1986, second opinion June 19, 1987; *Davison v. Mobile Infirmary*, Nos. 84-1183, 84-1231 and 84-1232, first opinion October 3, 1986, second opinion July 24, 1987; *Black Belt*

The opinion of May 22, 1987 practically invited Alabama Power Company to file a second application for rehearing to raise the § 12-22-72 issue. App. B, A-13 at A-21. Appellant even quotes this passage at page 7 of its Jursidictional Statement. "Issues regarding that provision usually arise for the first time in the appellate court and do not ripen into issues until the appellate court has affirmed a judgment for plaintiff. Such issues are normally handled by motion in the appellate court after the affirmance." Appellee asserts this statement by the Supreme Court of Alabama of its procedures supports her argument that appellant failed to properly present the federal question to the court below.

Furthermore, the Supreme Court of Alabama did not expressly pass on the federal question concerning § 12-22-72. Alabama Power Company admits "the majority opinion did not formally address appellant's claim regarding the constitutionality of § 12-22-72." Jurisdictional Statement at 6. Appellee disagrees with appellant's assertion that the opinion of May 22, 1987, "must be deemed by this Court as having implicitly upheld the constitutionality of § 12-22-72." Id. As argued above, there was no issue concerning § 12-22-72 until after the affirmance of the judgment on May 22, 1987. When a superseded money judgment is affirmed in full without condition, the affirmance damages of 10% are automatically included in the certificate of judgment. See *Chapman v. Rivers Constr. Co.*, 284 Ala. 633, 644, 227 So.2d 403, 414 (1969). Unless directed otherwise by the court, the clerk of the Supreme Court of Alabama will, as a ministerial act, include the 10% damages in the certificate of judgment. This non-discretionary, ministerial act cannot be read as an explicit or implicit ruling by the Supreme Court of Alabama on the issue of the constitutionality of § 12-22-72.

Wood Co., Inc. v. Sessions, No. 84-1222, first opinion October 3, 1986, second opinion June 30, 1987; *Reinhardt Motors, Inc. v. Boston*, No. 85-6, first opinion October 3, 1986, second opinion May 15, 1987; *Dependable Ins. Co. v. Kirkpatrick*, No. 85-1150, first opinion May 1, 1987, second opinion June 26, 1987. The status of these cases is a matter of public record from the Clerk of the Supreme Court of Alabama.

Appellant has failed to affirmatively demonstrate that the federal question sought to be reviewed was timely and properly raised in and expressly passed on by the Supreme Court of Alabama. Therefore, this appeal should be dismissed pursuant to Rule 16 of the Rules of the Supreme Court of the United States, *Illinois v. Gates*, 462 U.S. 213 (1983), and other cases cited in 16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure § 4022, p. 696 (1977).

II. The Federal Question Is Not Substantial

Assuming, *arguendo*, that the issue presented by Alabama Power Company is properly before this Court, the appeal should nonetheless be dismissed for want of a substantial federal question.

A. The Alabama Affirmance Statute Does Not Violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States

The right to an appeal in a civil case is guaranteed by neither the United States nor the Alabama Constitutions; appeal is a statutory privilege.[4] The right to a civil appeal is not a fundamental interest in equal protection analysis (such as the right to vote or travel), and losing defendants who supersede a money judgment are not a suspect class (such as classifications based on race or alienage). Neither are such defendants analogous to gender-based classifications or classifications based on legitimacy such as might trigger a middle-level or heightened scrutiny. Therefore, strict scrutiny is inappropriate and the Court should review the Alabama statute under the minimal scrutiny standard or rational basis test of equal protection review appropriate to economic or social welfare statutes.[5]

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[4] *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Johnson v. Barnes*, 250 Ala. 292, 292, 34 So.2d 144, 145 (1948).

[5] See, *Ortwein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1948).

"Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Clements v. Fashing,* 457 U.S. 957, 963 (1982). Alabama Power Company has the burden of showing that there is no logical connection between the statutory purposes and the classification created by the statute. The Court will not hold a statute invalid on equal protection grounds merely because the classification is not perfectly drawn, the classification results in some inequality, or the statute seems to the Court to be unwise. See *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 175 (1980); *Dandridge v. Williams,* 397 U.S. 471, 485-86 (1970).

Section 12-22-72 is quoted at page 3 of the Jurisdictional Statement. Appellant is incorrect, at page 7, when it states that § 12-22-72 applies to "litigants who unsuccessfully appeal from money judgments." It is important to note that the statute applies only when the defendant secures a stay of the execution of the money judgment against him by posting a supersedeas bond.

The Supreme Court of Alabama has held that "the real purpose of Section 814 [now codified as § 12-22-72] was to provide appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered." *City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So.2d 174, 180 (1950). This purpose was recognized as early as 1823 when the court in *Heart v. Judson,* Minor 135 (Ala. 1823) (assessing the statutory 10% damages) wrote, "it would seem that an obstinate debtor who refuses to liquidate his debt, should not be benefited by his injustice; and

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Appellant's Jurisdictional Statement is ambiguous, but it seems to presuppose that minimal scrutiny is appropriate. At page 11, appellant argues that "§ 12-22-72 bears no rational relationship to the asserted purpose of discouraging frivolous appeals," and "there is no rational relationship between penalties assessed under § 12-22-72 and the asserted purpose of providing "compensation" to a prevailing appellee."

even in actions ex delicto, the satisfaction of the judgment should not be delayed without responsibility for damages." It has also been held that the statute "was evidently intended to penalize frivolous or delay appeals . . . ." *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So. 205, 211 (1920).[6]

Appellee does not understand appellant to argue that compensation to the plaintiff for the delay in collecting on a judgment is not a legitimate end, appellant just argues that "§ 12-22-72 is simply a penalty on a penalty and is not compensatory to plaintiff-appellees in any sense." Jurisdictional Statement at 8. The 10% affirmance damages statute is rationally related to the legitimate purpose of compensating plaintiff-appellees for the denial of their right to their property during the pendency of an unsuccessful appeal. The legislature could rationally determine that a blanket rule for 10% damages was preferable for judicial economy to the alternative of having a post-affirmance "mini-trial" in each case to determine the actual damage to each individual plaintiff-appellee.

Again, it is crucial to understand that § 12-22-72 does not punish the taking of an appeal by a losing defendant. It only applies if the defendant, after a full trial, chooses to prevent the plaintiff from executing on the judgment by the filing of a supersedeas bond. The legislature could rationally decide that judgment interest does not adequately compensate the plaintiff. For example, in personal injury cases, plaintiffs are often in desperate need for cash for medical expenses and family needs; yet a long appeal may delay collection from the defendant. Judgment interest cannot compensate for these personal — as opposed to purely economic — difficulties suffered by many plaintiffs. In

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[6] The Court's opinion in *Burlington Northern R.R. Co. v. Woods,* ___ U.S. ___, 94 L.Ed.2d 1 (1987) recognized these two purposes of the Alabama statute. It is also interesting to note that the Court's opinion — that § 12-22-72 is not applicable in federal diversity cases — necessarily decided that the Alabama statute was procedural and did not touch on substantive rights.

many cases defendants can earn more compound interest on plaintiffs' money until the judgment is fully paid and simple judgment interest added.

The classification created by § 12-22-72 is not irrational, it has a quid-pro-quo quality. Just as there is no constitutional right to an appeal, there is no constitutional right to supersedeas if a statutory appeal is provided. In *Louisville & Nashville R.R. Co. v. Stewart,* 241 U.S. 261, 263 (1916), Justice Holmes wrote, "There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld." The *Stewart* case also upheld the application of Kentucky's 10% affirmance damages statute, and *Stewart* has been relied on by the Supreme Court of Alabama as authority for the constitutionality of § 12-22-72. *Atlanta, Birmingham & Coast R.R. v. Cary,* 250 Ala. 675, 35 So.2d 559 (1948).

Section 12-22-72 is one part of an integrated series of statutes relating to appeals. For the benefit of supersedeas, the legislature could reasonably exact a cost or burden. The legislature could rationally decide that plaintiffs must bear burdens which defendants do not, such as the pre-payment of filing fees. Another example is the fact that Alabama has not joined the national trend to allow recovery of pre-judgment interest. It is doubtful that this appellant would argue that the 1987 Alabama Legislature was acting irrationally when it enacted, in June 1987, several pieces of "tort reform" legislation which burden plaintiffs by placing caps on damages, requiring structured payments, and altering venue rules. See 1987 Ala. Acts Nos. 87-164, 181, 182, 183, 184, 185, 186, 187, 188 and 189.

Where legislatures have made distinctions similar to those made by § 12-22-72, the statutes have been found to reflect a rational balancing of competing interests. In *Empire State Ins. Co. v. Chafetz,* 302 F.2d 828, 830 (5th Cir. 1962), the court denied an Equal Protection Clause challenge to a statute which provided for the award of attorneys' fees in favor of insureds, but provided no similar relief for insur-

ance companies, relying on this Court's decisions in *Life and Casualty Ins. Co. of Tennessee v. McCray,* 291 U.S. 566 (1934), and *Farmers' and Merchants' Ins. Co. v. Dobney,* 189 U.S. 301 (1903). See *Postow v. OBA Federal Savings & Loan Association,* 627 F.2d 1370, 1386-88 (D.C. Cir. 1980) (upholding provision in Truth in Lending Act awarding attorneys' fees only to borrowers); *Devito v. Imbriano,* 30 A.D.2d 796, 332 N.Y.S.2d 577 (1972) (upholding a 20% penalty statute directed to employers not paying awards within ten days).

Alabama Power Company does not argue that deterring frivolous and delay appeals is not a legitimate state end, it argues that the statute is unconstitutionally underinclusive and overinclusive. Even if the Court finds § 12-22-72 is not rationally related to the purpose of compensating plaintiffs for the loss of the use of their property when a defendant elects to supersede, the statute is rationally related to the important state purpose of deterring frivolous and delay appeals. A "law may not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical,* 348 U.S. 464, 487 (1955).

Section 12-22-72 does not irrationally or unfairly discriminate against defendants who choose to supersede. Parties who owe a judgment have every incentive to delay payment by filing an appeal, regardless of its merits. There is also an incentive to supersede and continue to hold plaintiff's money. The incentive to prosecute even a seemingly dilatory appeal increases with the size of the judgment since the marginal cost of additional legal fees becomes quite small compared to the judgment. For losing plaintiffs, however, having already expended the cost of a trial, the further fees required for an appeal are a sufficient disincentive to taking an unmeritorious appeal. Moreover, while delay in payment of judgments extends the time before an injury is redressed, no comparable policy applies with respect to losing plaintiffs. The statute thus is rationally related to the policies it is intended to promote. Promoting

prompt payments of debts and discouraging useless appeals also promotes judicial economy. These are certainly legitimate state concerns.

The double-bond requirement on lessees struck down in *Lindsey v. Normet*, 405 U.S. 56 (1972), is not analogous to this case. At page 79, the *Normet* Court stressed that, "The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be." The Alabama statute does not raise the special concern for the poor, nor does it — even as a practical matter — foreclose appeal to anyone. Recall that a defendant who does not choose to supersede does not suffer the 10% assessment. Moreover, there is no proof that great numbers of meritorious appeals are deterred by the statute. The *Lindsey* Court remarked that "the double-bond requirement *heavily* burdens the statutory right of an FED defendant to appeal." 405 U.S. at 77 (emphasis added).

The statute in *Lindsey* applied only to FED appellants (tenants). "No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination." 405 U.S. at 78. The Alabama statute applies to *all* civil defendants who choose to supersede a money judgment. The statute is directed narrowly and specifically at a class of parties which has an incentive to cause delay. The classification is reasonable: an unsuccessful defendant will tend to protract the litigation process as long as possible so that he may benefit from the funds rightfully owing to the other party. Plaintiffs who do not receive a judgment at trial do not have a similar incentive to prolong litigation. However, § 12-22-72 would apply to a plaintiff who suffered an adverse judgment on a counterclaim. Section 12-22-72 discourages frivolous and delay appeals and makes no arbitrary classification between similarly situated persons unrelated to the legitimate objec-

tives of the statute. Thus, the equal protection attack on § 12-22-72 does not present a substantial federal question.

B. The Federal Question Is Not Substantial Because the Alabama Statute at Issue Has Been Abrogated

The Supreme Court of Alabama issued its certificate of judgment (which assessed the 10% damages) on June 9, 1987. App. B, A-12. On June 11, 1987, 1987 Ala. Acts No. 87-188 became effective. Act 87-188 amended § 12-22-72 to eliminate completely the provision for 10% damages. This appeal does not present a substantial federal question because it cannot serve as precedent for later cases — no more affirmance damages will be assessed in Alabama.

C. The Mississippi Statute at Issue in Crenshaw *is Distinguishable from the Alabama Statute*

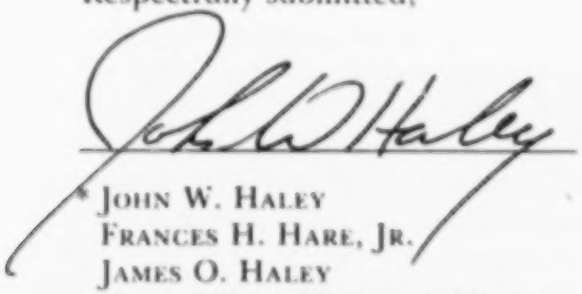
The appellant thrice in its Jurisdictional Statement cites a Mississippi case pending in this Court, *Bankers Life and Casualty Co. v. Crenshaw,* 85-1565 (probable jurisdiction noted March 9, 1987). At page 3, appellant says the § 12-22-72 issue "is closely related to similar questions . . . pending before this Court" in *Crenshaw.* Miss. Code Ann. § 11-3-23 (Supp. 1986) provides for 15% affirmance damages. It differs from the Alabama statute in several respects, but in at least one major regard: the Mississippi statute applies to *all* money judgments, not just to superseded judgments. Appellee sees this as a crucial distinction. *Louisville & Nashville R.R. Co. v. Stewart,* 241 U.S. 261 (1916) is precedent for the constitutionality of the Alabama statute, but, because it laid great stress on the fact the Kentucky statute applied only to superseded judgments, it is not authority for the Mississippi statute. See Comment, *Mandatory Assessment of Damages Against An Unsuccessful Appellant: A Constitutional Analysis,* 53 Miss. L.J. 281, 292 (1983).

Because of the differences in the Mississippi and Alabama statutes, it would not serve judicial economy or other prudential concerns for the Court to note probable jurisdiction in this case based in part on its decision to review the Mississippi case.

CONCLUSION

For the foregoing reasons, the appeal in this case should be dismissed.

Respectfully submitted,



* JOHN W. HALEY
FRANCES H. HARE, JR.
JAMES O. HALEY
HARE, WYNN, NEWELL & NEWTON
700 City Federal Building
Birmingham, Alabama 35203
(205) 328-5330

Attorneys for Appellee

* Counsel of Record

September 18, 1987

Supreme Court, U.S.
FILED
OCT 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-294

IN THE

Supreme Court Of The United States

October Term, 1987

ALABAMA POWER COMPANY,
Appellant,

v.

BRENDA LOUISE CANTRELL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

Reply Brief

*JOHN P. SCOTT, JR.
MARTHA F. PETREY
BALCH & BINGHAM
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

BILLY L. CHURCH
CHURCH, TRUSSELL & ROBINSON
P. O. Box 504
Pell City, Alabama 35125
(205) 338-2295

Attorneys for Appellant

**Counsel of Record*

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Reply Brief

ARGUMENT

I. The Federal Question Was Properly Presented to and Ruled Upon by the Supreme Court of Alabama.

Appellee's argument in support of its Motion to Dismiss suggests that the federal question before this Court regarding the constitutionality of § 12-22-72, *Code of Alabama* (1975) was not properly raised or ruled upon by the Supreme Court of Alabama. This superficial suggestion has no support in and is contradicted by the opinions and orders of the Supreme Court of Alabama in this action.

There can be no dispute that the Supreme Court of Alabama's first opinion of September 19, 1986 affirmed the judg-

ment of the trial court on the issue of the liability of Alabama Power Company in this action. App. A, A-11.[1] This is also confirmed by the Alabama court at the outset of its second opinion of May 22, 1987. App. B, A-13. As the appellee concedes, the only purpose for the remand to the trial court upon the entry of the first opinion was for the trial court to articulate its reasons for refusing to grant a new trial or remittitur on the ground of the excessiveness of the $1 million verdict.[2]

Because the first opinion represented an affirmance of the judgment as to liability, Alabama Power Company timely filed its Application for Rehearing, which, among other issues, raised the federal question regarding the constitutionality of § 12-22-72. App. G, A-41-43. It also filed a brief addressing *all* issues raised in the Application. App. G, A-44-67. During the pendency of the remand, the Supreme Court of Alabama did not rule upon the Application for Rehearing but held it for ruling at the time of its review of the trial court's opinion and the issuance of its second opinion. App. B, A-13. In its second opinion, the Alabama court states that this federal question has been raised pursuant to a "timely filed" Application for Rehearing. App. B, A-13-14. While this opinion expressly addresses the issue of liability and refers to the issue of the constitutionality of the punitive damage award, both of which were also presented in the Application for Rehearing, it does not expressly state its opinion on the constitutionality of § 12-22-72. *However,* the Alabama court expressly ruled upon *all* issues presented in the Application for Rehearing as follows:

> "Based on the foregoing, we are of the opinion that the application for rehearing is due to be overruled."

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[1]"App." refers to the Appendix to Alabama Power Company's Jurisdictional Statement.

[2]The remand was ordered in accordance with the procedure required in *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), which mandated that a trial court articulate its reasons for granting or denying a new trial or remittitur on the grounds of excessiveness or inadequacy of the verdict. Here, the trial judge was required to state its reasons for overruling Appellant's Motion for New Trial or Remittitur. App. D, A-36.

App. B, A-13-22. Notwithstanding Appellee's suggestions, the Alabama court gave *no* indication that *any* of the issues presented in the Application for Rehearing were premature or could not be effectively ruled upon at that stage of the proceeding so to obviate the need for the filing of an additional Application for Rehearing addressing the same issues. Moreover, the Supreme Court of Alabama's refusal to express its opinion on this issue is not improper or unexpected for it has repeatedly overruled, *without opinion*, Applications for Rehearing presenting the same federal question.[3] Therefore the actions of the Supreme Court of Alabama here clearly demonstrate that the issue was before the court and was rejected which satisfies this Court's requirements that the issue be raised *or* passed upon (here overruled) by the State court. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *Hill v. California*, 401 U.S. 797, 805 (1971).

Appellee's suggestion that the state court must *expressly* pass upon the federal issue finds little support in other decisions of this Court. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), Justice Powell delivered an opinion which decided a due process issue not expressly ruled upon by a state supreme court. Regarding the state court's silence on the federal question, the Court stated:

> On the record in this case, *despite the State Supreme Court's failure to address the constitutional issue, it is clear*

[3]Appellee refers to several recent decisions of the Supreme Court of Alabama involving *Hammond*-type remands in contending that this issue could only be presented by an Application filed following the second opinion. Appellee's Motion to Dismiss, p. 5, n.3. However, these cases provide *no* support for appellee's arguments. In *none* of these cases did the Supreme Court of Alabama rule on an Application for Rehearing in its second opinion following the *Hammond* remand, as was the case here. Moreover, in the only two cases in which the constitutionality of § 12-22-72 was presented by Application for Rehearing, the Supreme Court of Alabama overruled the Application by separate order *without* opinion. *Reinhardt Motors, Inc. v. Boston*, No. 85-6, second opinion May 15, 1987, app. for rehearing overruled September 4, 1987; *Dependable Ins. Co. v. Kirkpatrick*, No. 85-1150, second opinion June 26, 1987, app. for rehearing overruled September 18, 1987.

> *that Chambers asserted denial of due process . . .* after the affirmance of his conviction by that court, Chambers filed a petition for rehearing addressing almost entirely to the claim that his trial had not been conducted in a manner consistent with traditional notions of due process. The State Supreme Court raised no question that Chambers' claims were not properly asserted . . .

410 U.S. at 290, n. 3 (emphasis added).

Similarly, in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), this Court noted:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, *but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. If the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.*

278 U.S. at 67. (footnote omitted) (emphasis added). *Zimmerman* raised the question of the constitutionality of a state statute. *Id.* Although the state court did not expressly rule upon the federal constitutional challenge, this Court stated:

> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. *If the necessary effect of the judgment has been to deny the claim, that is enough.*

Id. (footnote omitted) (emphasis added).

The express language of the Supreme Court of Alabama's second opinion here demonstrates its intent to affect a final disposition of the issues raised in Alabama Power Company's Application for Rehearing. It was therefore proper and, indeed, appropriate for the Appellant to rely upon this ruling and proceed with this appeal.

II. Appellee's Argument on Jurisdiction, if Accepted, Would Render a Wasteful and Unjust Result.

Appellee's suggestion concerning the jurisdiction of this Court, if accepted, could render a wasteful and unjust result. To conclude that Alabama Power Company should have filed another Application for Rehearing on this federal issue, only to have the same overruled, without opinion, as the Supreme Court of Alabama has traditionally done, would be totally inconsistent with the interests of judicial economy and avoiding unnecessary delay and waste upon appeal. There is nothing that prevented the Alabama court from holding the Application for Rehearing for consideration and ruling at the time of its second opinion and the appellee offers no suggestion to the contrary.

This Court has previously demonstrated its desire to avoid roundabout and wasteful procedures in the interest of justice in addressing similar constitutional issues. *Mills v. Alabama,* 384 U.S. 214 (1966) involved a constitutional challenge to a state statute which prohibited newspaper editorials, which urged the public to vote in a certain way, from being published on election day. *Id.* at 215. The trial court ruled in favor of the editorialist based upon the First and Fourteenth Amendments to the Constitution. The Supreme Court of Alabama reversed and remanded to the trial court with directions. *Id.* at 216. The editor appealed to this Court, and the State moved to dismiss for lack of jurisdiction claiming that the judgment of the state court was not final. *Id.* at 217.

This Court provided the following reasoning:

> The State argues that since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered "final." This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he

> therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. *Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.* The language of § 1257 as we construed it in *Pope v. Atlantic Line R. Co.*, 345 U.S. 379, 381-383, does not require a result leading to such consequences. See also *Construction Laborers v. Curry*, 371 U.S. 542, 548-551; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72-74. Following those cases we hold that we have jurisdiction.

Id. at 217-218 (footnote omitted) (emphasis added).

This Court's reasoning in *Mills* is equally applicable here for the filing of a second Application for Rehearing would have simply resulted in yet another order overruling the application, with the resulting "waste of time and energy". The Supreme Court of Alabama exercised the opportunity to act upon Alabama Power Company's Application for Rehearing in conjunction with its affirmance of its judgment as to damages. Accordingly, in the interest of justice, it must be concluded that the necessary prerequisites have been satisfied to invoke the jurisdiction of this Court for consideration of this federal question.

III. The Federal Question is Substantial.

This Court recently declared that the identical federal question presented herein is an "important issue[ ] which, in an appropriate setting, must be resolved." *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813, slip op. at 14 (1986). Apellee has either overlooked this recognition or wishes to ignore it in arguing that this issue is not substantial.

Even more recently, in *Bankers Life & Casualty Company v. Crenshaw*, No. 85-1765 (prob. juris. noted March 9, 1987), this Court noted probable jurisdiction to review two federal questions, one of which is a constitutional challenge to the Mississippi affirmance penalty statute, *Miss. Code Ann.*, § 11-3-23 (Supp. 1986). Contrary to the Appellant's contention, the Mississippi affirmance penalty statute does not differ in substance or effect from the Alabama statute in question. Admittedly, *Miss. Code Ann.*, § 11-3-23 (Supp. 1986) applies to all money judgments, while § 12-22-72, *Code of Alabama* (1975) applies to all money judgments which have been stayed or superseded. However, the denial of equal protection under the law is the end result of both statutes. The distinction in application of these statutes is *not* a distinction for purposes of the federal question herein presented and the unconstitutional result is the same: the affirmance penalty penalizes defendants who pursue non-frivolous appeals unrelated to costs imposed on the plaintiff[4] and allows plaintiff-appellants to take frivolous appeals without the risk of any comparable penalty or cost. In this manner, both the Mississippi statute and § 12-22-72 deny defendant-appellants the equal protection guaranteed by the Fourteenth Amendment of the Constitution.[5]

Appellant does not dispute that strict scrutiny is not required here, but emphasizes that § 12-22-72, like the Mississippi statute, bears no rational relationship whatsoever to the purported state ends of discouraging frivolous appeals and providing additional damages for affected plaintiff-appellees.[6]

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[4]The defendant is, of course, obligated by statute to pay post-judgment interest (12%) to the plaintiff-appellee as compensation for delay in execution on a money judgment. § 8-8-10, *Code of Alabama* (1975).

[5]Appellee also suggests that this Court's decision in *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261 (1916) is authority for the constitutionality of § 12-22-72. However, it is clear that this Court did not address in *Stewart* the equal protection claim now presented for resolution in this action.

[6]*Montgomery Light & Water Power Company v. Thombs*, 204 Ala. 678, 684, 87 So. 205, 211 (1920) and *City of Birmingham v. Bowen*, 254 Ala. 41, 47, 47 So. 2d 174, 180 (1950) set out these purposes as purported justi-

Appellee's argument that this federal question is insubstantial because § 12-22-72 has been abrogated by the Alabama legislature is absurd, for in fact the abolishment of the statute serves to support Appellant's position rather than undermine it. Admittedly, Alabama has amended § 12-22-72 to eliminate completely the 10% penalty, effective June 11, 1987. 1987 *Ala. Acts* No. 87-188. Although Appellant does not purport to put itself into the mind of the state legislature, it can only reasonably conclude that the Alabama legislature recognized the invalidity and inherent unfairness of the non-discretionary affirmance penalty statute and therefore eliminated it. However, the abrogation of § 12-22-72 *in no way* negates the wrongful application of such penalty against Alabama Power Company, which is now exposed in this case to a 10% penalty of $100,000, which results in a violation of Appellant's rights under the Equal Protection Clause of the Fourteenth Amendment.

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fications for the affirmance penalty statute. Appellant has addressed this issue in its Jurisdictional Statement, at 10-12.

CONCLUSION

For the foregoing reasons, as well as those presented in Appellant's Jurisdictional Statement, Appellant's Motion to Dismiss should be denied and the jurisdiction of this important federal question should be noted by this Court.

Respectfully submitted,

October 6, 1987

*JOHN P. SCOTT, JR.
MARTHA F. PETREY
BALCH & BINGHAM
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

BILLY L. CHURCH
CHURCH, TRUSSELL & ROBINSON
P. O. Box 504
Pell City, Alabama 35125
(205) 338-2295

Attorneys for Appellant

**Counsel of Record*